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——— *Appeal newly given by law—Proceedings instituted prior to change in procedure—Appeal from order under s.* 312, *Civil Procedure Code* (*Act XIV of* 1882)—*Act VII of* 1888, *ss.* 55 *and* 56.] It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made: *Held*, accordingly, that an appeal from an order under the second paragraph of s. 312 of the Civil Procedure Code, although made before Act VII of 1888 came into force, would, upon the operation of that Act lie to the Court to which an appeal would lie from the decree in the suit in relation to which such order was made, *Hurrosindari Dabi* v. *Bhojohari Das Manji* (I. L. R., 13 Calc., 86,) explained and distinguished. IN THE MATTER OF ANUND CHUNDER ROY *v.* NITAI BHOOMIJ 429

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———*Letters Patent, High Court, cl.* 15—*"Judgment"—Order granting review of judgment—Civil Procedure Code,* 1882, *s.* 629.] A second appeal was decided on the 1st June 1888 in favour of the respondents by two Judges of the High Court. On the 24th July 1888, an application for review was filed with the Registrar. Various reasons prevented the two Judges from sitting together until the month of March 1889. On the 6th March the matter came up before them, when a rule was issued, calling upon the respondents to show cause why a review should not be granted, and made returnable on the 28th March 1889. On that day one of the Judges had left India on furlough, and the rule was taken up, heard and made absolute by the other of the two Judges sitting alone: *Held*, that the order was not a judgment within the meaning of cl. 15 of the Letters Patent: and that no appeal would lie therefrom, the order being final under s. 629 of the Code of Civil Procedure. *Bombay-Persia Steam Navigation Company* v. *The Zuari* (I. L. R., 12 Bom., 171) and *Achaya* v. *Ratnavelu* (I. L. R., 9 Mad., 253) approved. AUBHOY CHURN MOHUNT *v.* SHAMANT LOCHUN MOHUNT 788

——— *Suit for Rent—Question as to amount of Rent—Bengal Tenancy Act* (*VIII of* 1885), *s.* 153.] Where there was a question as to the amount of rent annually payable, the plaintiffs claiming Rs. 15 and the defendants alleging the rent to be only Rs. 7-8: *Held*, an appeal lay under s. 153 of the Bengal Tenancy Act. AUBHOY CHURN MAJI *v.* SHOSHI BHUSAN BOSE 155

——— *Superintendence of High Court—Bengal Tenancy Act* (*VIII of* 1885), *ss.* 104, *cl.* 2, 105, 106, 108—*Rule* 33 *of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code* (*Act XIV of* 1882), *ss.* 108, 622—*Order of Special Judge as to settlement of rents.*] The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents. SHEWBARAT KOER *v.* NIRPAT ROY 596

——— **against whole decree by one defendant.** *See* LIMITATION ACT, 1877, ART. 179 598

——— **in Criminal Case**—*Criminal Procedure Code* (*Act X of* 1882), *s.* 411—*Appeal from sentence of Presidency Magistrate.*] No appeal lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200, or a further period of three months' simple imprisonment, passed by a Presidency Magistrate. SCHEIN *v.* THE QUEEN-EMPRESS ... 799

———, **Presentation of.** *See* LIMITATION ACT, 1877, ART. 179 250

——— **to Privy Council**—*Concurrence of two Courts on facts—"Affirming" judgment of Lower Court—Civil Procedure Code* (*Act XIV of* 1882), *s.* 596—*Substantial question of law—Case disposed of on facts.*] Where the issues in a case involved questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact, sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favour of the plaintiff, but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him on all his findings or in the reasons on which they were based: *Held*, on an application for leave to appeal to the Privy Council, that the High Court did not "affirm" the judgment of the lower Court within the meaning of s. 596 of the Civil Procedure Code. *Held*, also, even assuming the judgment of the Lower Court was affirmed by the High Court that there were substantial questions of law

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———*Award on one point only—Remission to arbitrator—Refusal by arbitrator to act—Limitation—Adverse possession.*] A case was referred for decision to an arbitrator. The arbitrator made his return, deciding by the award only one of the issues raised in the case, *viz.*, that the defendants had been in possession of the land in suit for more than twelve years. The plaintiffs and the defendants claimed under the same landlord. The Munsiff remitted the award to the arbitrator for determination of the other matters arising in the case; the arbitrator, however, refused to act further in the matter, and the Munsiff himself took up the case and decided it in favour of the plaintiff. On appeal, the Subordinate Judge held that the award made by the arbitrator was sufficient for the determination of the case, and reversed the decision of the Munsiff, and gave the defendants a decree in terms of the award: *Held*, that as the plaintiffs and the defendants claimed under one and the same landlord, and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that the Munsiff had acted rightly, on the arbitrator declining to complete the award, in deciding the case himself. JONARDON MUNDUL DAKNA *v.* SAMBHU NATH MUNDUL ... 806

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Attempt to commit Offence—*Attempt to cheat—Currency Office—Application for payment of lost halves of Currency Notes.*] A man may be guilty of an attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. *Reg.* v. *Hensler* 11 Cox C. C., 570, referred to. *M* wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves, and that the notes had been withdrawn from circulation and cancelled, sent *M* the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying *M* in respect of the notes. The form was filled up and signed by *M* and returned by him to the Currency Office: *Held*, that, although there was no intention on the part of the Currency Office to pay the amount of the notes, *M* was guilty of an attempt to cheat. THE GOVERNMENT OF BENGAL *v.* UMESH CHUNDER MITTER ... 310

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Benami Transaction—*Estoppel—Misrepresentation—Heir when bound by the acts of ancestor.*] *B* purchased some property from *D.* (a member of a joint Mitakshara family) in the name of his wife *K*, with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in fact continued to treat

Benami Transaction — *Continued.*

the property as her own. During *S's* minority, *C*, the nephew of *D*, who was now of age, brought a suit for pre-emption against *K* in respect of this property, and obtained a consent decree under which he took possession. *S*, then, on attaining majority, instituted a suit against *C* for the recovery of the property, as the heir and representative of his father, on the ground that *K* was a mere *benamidar*. The defence taken by *C*, amongst others, was that *K* was the real owner he believed her to be: *Held*, that on the authority of *Luchmun Chunder Geer Gossain* v. *Kalli Churn Singh*, 19 W. R., 292, it was a good defence, for, even on the assumption that the purchase was *benami*, *S* as heir of *B* was bound by the misrepresentation of the latter. CHUNDER COOMAR *v.* HURBUNS SAHAI 137

——————*Estoppel—Persons claiming under person who creates the benami.*] The mere fact of a benami transfer does not in itself constitute such misrepresentation as to bind all persons claiming under the person who creates the benami. *O* made a benami gift of his property to his wife *A*. The deed of gift was registered and purported to be made in consideration of the fixed dower due to *A*. There was no mutation of names; but *O* managed the property as *A's* am-muktar under a general power-of-attorney executed by her in his favour. On the death of *O*, *A* mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against *A*, the mortgaged property was purchased by the defendants. On the death of *A*, *H* and *R*, the son and daughter of *A*, sold their shares in the property, which they had inherited from their father *O*, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of *H* and *R*, and for partition: *Held*, that the acts of *O* were not such as to constitute an estoppel as against his heirs, and, therefore, the plaintiff was entitled to the relief he sought. *Luchmun Chunder Geer Gossain* v. *Kali Churn Singh* (19 W. R., 292) explained. SARAT CHUNDER DEY v. GOPAL CHUNDER LAHA 148

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——————————————**s. 12**—*Transfer of a permanent tenure—Permanent tenure, Registration of.*] The transfer of a permanent tenure under s. 12 of the Bengal Tenancy Act is complete as soon as the document is registered. KRISTO BULLUV GHOSE *v.* KRISTO LAL SINGH 642

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(*I of* 1868), *s.* 6] Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy in respect of which the rent had become due was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by s. 170 of the Bengal Tenancy Act of 1885 : *Held*, that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution; the term "proceedings" in s. 6 of Act I of 1868 not including proceedings in execution after decree. DEBB NARAIN DUTT *v.* NARENDRA KRISHNA 267

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——————, **s. 108.** *See* APPEAL 426, 596
——————, **s. 111.** *See* SET-OFF 711
——————, **s. 223.** *See* EXECUTION OF DECREE ... 457, 465
——————— **s. 230**—*Application to transfer decree for execution—Application for execution of decree—"Granting" application Meaning of—Issue of process.*] An application to the Court which passed a decree for a certificate to allow execution to be taken out in another Court, is not an application for the execution of the decree within the term of s. 230 of the Code of Civil Procedure. The "granting" of an application under that section includes the issue of process for execution of the decree. NILMONEY SING DEO *v.* BIRESSUR BANERJEE 744
——————, **s. 230**, cl. *(b)*—*Limitation—Execution of decree—Order directing payment of money at a certain date.*] A judgment-debtor on being arrested in execution of a decree presented a petition asking for fifteen days' time to pay the amount of the decree, and, the decree-holders consenting, the Court made an order in the terms, "let the petition be filed:" *Held*, that this order did not amount to one directing payment of money to be made at a certain date within the meaning of s. 230, cl. *(b)* of the Civil Procedure Code. *Bal Chand* v. *Raghunath Das*, I. L. R., 4 All., 155, followed. JOGOBUNDHOO DAS *v.* HORI RAWOOT 16
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——————, **s. 232.** *See* EXECUTION OF DECREE 347
——————, **ss. 233, 243 246.** *See* SET-OFF 619
——————, **s. 244.** *See* SALE IN EXECUTION OF DECREE ... 33
——————, **s. 244**—*Claim to attached property—Question to be decided in execution—Liability of property to be sold in execution.*] The question whether property is liable to be sold in execution of a decree is one to be determined under s. 244 of the Code of Civil Procedure. *Chowdhry Wahed Ali* v. *Jumaee* 11 B. L. R., 149; 18 W. R., 185, followed in principle. MUNGESHUR KUAR *v.* JAMOONA PRASAD 603
——————, **s. 244**—*Question relating to execution of decree—Parties to suit—Representatives.*] *K* and *M* were brothers alleged to be joint in food, dwelling, and business. In a suit which was brought against *K*, and which was unsuccessfully defended by him on behalf of himself and the joint family, a decree for costs was passed against him. *K* died after decree, and the decree-holder in execution had *K's* sons put on the record as his representatives. Certain property was attached in execution, and the sons objected that the property in question had come to them as the self-acquired property of their uncle *M*, who had died after *K*, and that they had inherited no property from their father *K*. Their objection was allowed by the Court executing the decree, and the property was ordered to be released from attachment. In a suit brought by the assignee of the decree-holder against the sons of *K* to establish his right to proceed against the property in question in execution of the decree against *K*:—*Held*, that the question of the liability of the property to be taken in execution in the hands of the defendant was a "question arising between the parties to the suit in which the decree was passed *or their representatives*, and relating to the execution, &c., of the decree" within the meaning of s. 244 of the Civil Procedure Code, and that the suit was consequently not maintainable. The cases as to the position of representatives added to the suit either before or after decree referred to and discussed. RAJRUP SINGH *v.* RAMGOLAM ROY 1
——————, **s. 244**—*Representative of Judgment-debtor—Purchaser at execution sale—Private purchase—Limitation Act, 1877, Art. 179—Application not in accordance with law—Application for execution by benamidar—Purchase* pendente lite.] The defendants Nos. 2, 3 and 4 were, together with one *M*, the owners of certain immoveable property, including two mehals, Olipore and Ekdhala, sub-

Civil Procedure Code, s. 244—*Continued.*

ject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending, one *K D* took out execution of a money decree which he had obtained in 1871 against defendant No. 3, and put up for sale the mehal Olipore, which was purchased by the father of the plaintiff *A*, who eventually obtained possession of it through the Court. The plaintiff *B* purchased privately the mehal Ekdhala from the mortgagors and from *M*, some time after the date of the decree on the mortgage. That decree was in course of execution when the mortgagee died, and his estate came into the hands of the Administrator-General, who, on 13th August 1878, sold the decree to *G*, defendant No. 1. After this sale several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice to the defendants under s. 232 of the Civil Procedure Code, *G's* name was substituted as decree-holder, and execution was taken out against the mortgaged property including Olipore and Ekdhala. The plaintiffs each claimed the mehal they had respectively purchased, but their claims were disallowed. In suits brought by the plaintiffs for a declaration of their right to hold the properties free of the mortgage, the Court found that *G* was only a *benamidar* so far as his purchase of the mortgage decree was concerned: *Held*, the plaintiff *A*, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors, the mortgagors, within the meaning of s. 244 of the Civil Procedure Code; but the case was different with respect to plaintiff *B*, who claimed by private purchase, and must be considered the representative of the judgment-debtors within the meaning of that section. *Dinendronath Sannyal* v. *Raj-Coomar Ghose* (L. R., 8 I. A., 65; I. L. R. 7 Calc., 107), *Anundmoyee Dosse* v. *Dhonendro Chunder Mookerjee* (14 Moore's I. A., 101; 8 B. L. R., 122), and *Lalla Prabhulal* v. *Mylne* (I. L. R., 14 Calc., 401,) referred to. *Held*, also, that *G* being merely a *benamidar*, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code, were not applications made in accordance with law, within the terms of Art. 179 of the Limitation Act 1877, so as to prevent the operation of the law of limitation. Execution of the mortgage decree was therefore barred. *Abdul Kureem* v. *Chukhun* (5 C. L. R., 253). *Denonath Chuckerbutty* v. *Lullit Coomar Gangapadhya*, I. L. R., 9 Cal., 633; 12 C. L. R., 145), and *Mis. Ap.* 453 of 1885, unreported, followed; *Purna Chandra Roy* v. *Abhaya Chundra Roy*, (4 B. L. R., App., 40), and *Nadir Hossein* v. *Pearoo Thovil-*

Civil Procedure Code, s. 244—*Continued.*

darinee (14 B. L. R., 425), dissented from. The mortgage decree having become inoperative, the plaintiff *A* though a purchaser *pendente lite*, was no longer bound by it, and the defendant therefore was not entitled to enforce the mortgage against him. GOUR SUNDER LAHIRI *v.* HEM CHUNDER CHOWDHURY. GOUR SUNDER LAHIRI *v.* HAFIZ MAHOMED ALI KHAN ... 355

——————————, **s. 257 A**—*Agreement for, or to give, time for satisfaction of judgment-debt—Agreement without sanction of Court—Illegal contract—Contract Act (IX of 1872), s. 23—Consideration.*] The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and *T* his father, by which they both became liable for the amount of the decree with interest at 18¾ per cent. In a suit on the bond, it was contended that the bond was void under s. 257A of the Civil Procedure Code, as being an agreement to give time for the satisfaction of the judgment-debt made for no consideration and without the sanction of the Court, and also without such sanction providing for payment of a sum in excess of the amount due under the decree; that it was void within the meaning of s. 23 of the Contract Act as being forbidden by, or of a nature to defeat the provisions of, s. 257A of the Civil Procedure Code; and that, consequently, the suit on it was not maintainable: *Held*, that s. 257A of the Code was not applicable. That section was framed to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, *in execution of the decree*, but was not intended to take away the right of parties of entering into a fresh contract, either for payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than may be covered by the decree, if it be for a proper consideration. In this case the consideration for the bond was a lawful consideration; it could not be said that because satisfaction of the decree was not certified to the Court, there was no consideration: *Held*, also, the bond was not void under s. 23 of the Contract Act. *Semble:* The words "any law" in that section refer to some *substantive* law, and not to an adjective law, such as the Procedure Code is. HUKUM CHAND OSWAL *v.* TAHARUNNESSA BIBI ... 504

——————————, **s. 258.** *See* PENAL CODE, s. 210 126

——————————, **ss. 244, 262.** *See* REGISTRAR OF HIGH COURT, AUTHORITY OF **330**

——————————, **s. 265,** *See* PARTITION 203

Civil Procedure Code—*Continued.*

——————————, **s. 287**: *See* SALE IN EXECUTION OF DECREE ... 794

——————————, **s. 293**—*Question for Court executing decree—Defaulting purchaser answering for loss by re-sale—Description of property at sale and re-sale, Difference of—Regular suit—Appeal.*] An appeal will lie against an order made under s. 293 of the Code of Civil Procedure—*Sree Narain Mitter* v. *Mahtab Chand*, 3 W. R., 3, *Sooruj Buksh Singh* v. *Sree Kishen Doss*, 6 W. R. Mis., 126, *Joobraj Singh* v. *Gour Buksh*, 7 W. R., 110, *Bisokha Moyee Chowdhrain* v. *Sonatun Doss*, 16 W. R., 14, *Ram Dial* v. *Ram Dass*, I. L. R., 1 All, 181, followed. The sale contemplated by s. 293 of that Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293. *Semble*: That even if the difference of description was due to the value of the property having been changed between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit and not by an application under s. 293. BAIJNATH SAHAL *v.* MOHEEP NARAIN SING ... 535

——————————, **s. 294**. *See* SALE IN EXECUTION OF DECREE ... 132

——————————, **s. 306**. *See* SALE IN EXECUTION OF DECREE ... 33

——————————, **s. 311**. *See* SALE IN EXECUTION OF DECREE ... 33

——————————, **s. 312**. *See* APPEAL 429

——————————, **s. 312**. *See* SALE IN EXECUTION OF DECREE ... 33

——————————, **ss. 320, 521, 525, 526**. *See* SUPERINTENDENCE OF HIGH COURT 482

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——————————, **s. 541**. *See* LIMITATION ACT, 1877, ART. 179 ... 250

——————————, **s. 549**. *See* EXECUTION OF DECREE 323

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——————————, **ss. 584, 585**. *See* SECOND APPEAL ... 753

——————————, **s. 588**. *See* APPEAL 426

——————————, **s. 596**. *See* APPEAL TO PRIVY COUNCIL 287, 292, *note*

——————————, **s. 622**. *See* APPEAL 596

——————————, **s. 622**. *See* SUPERINTENDENCE OF HIGH COURT 482, 749

——————————, **ss. 623, 627**. *See* REVIEW OF JUDGMENT ... 788

——————————, **s. 629**. *See* APPEAL 788

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Condition of Sale. *See* SALE BY AUCTION 702

Conditional Adoption. *See* HINDU LAW, ADOPTION 556

Consideration. *See* CIVIL PROCEDURE CODE, 1882, s. 257A 504

Contract, Construction of—*Cash on delivery—Readiness and willingness to take delivery—Delivery, Failure of, in terms of contract—Breach of contract—Custom.*] Where a contract is for delivery "free on board," and cash on delivery is provided for, payment may be required upon delivery of the goods at the time and place mentioned for delivery in the contract. HEILGERS & Co. *v.* JADUBLALL SHAW ... 417

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Co-sharer—*Fractional shareholders in joint undivided estate—Lien on tenure for share of rent—Sale of tenure in satisfaction of decree.*] The owner of a fractional share in a joint undivided estate has no lien on the tenure itself for his

Co-sharer—*Continued.*

share of the rent, although such share is collected separately, and, therefore, cannot cause the tenure to be sold in satisfaction of a decree for his share of the rent. BHABA NATH ROY CHOWDHRY *v.* DURGA PROSUNNO GHOSE 326

Co-sharers. Receipts for rent signed by one of several. *See* BENGAL TENANCY ACT, s. 88 155

Costs. *See* EVIDENCE 62

———. *See* JURISDICTION 13

Court of Wards Act (Bengal Act XI of 1879), s 55—*Bengal Act III of* 1881, *s.* 7—*Suit on behalf of ward by Manager without sanction of the Court of Wards. Effect of—Sanction after appeal, Effect of.*] In the absence of some order by the Court of Wards authorising the bringing of a suit, a suit instituted by a manager on behalf of a ward must be dismissed. A suit was instituted in the Court of the First Subordinate Judge of Dacca on behalf of a ward by his manager without the order or sanction of the Court of Wards, and proceeded to judgment without any such order or sanction. The suit was partially decreed; and the manager appealed to the District Judge for that portion of the claim which had been dismissed by the Court of first instance. At the hearing of the appeal, an application was filed on behalf of the appellant, accompanied by a letter giving sanction to the institution of the suit, the appeal and other proceedings connected therewith, with retrospective effect from the date of its institution. The Judge dismissed the suit. The plaintiff appealed to the High Court: *Held*, having regard to s. 55 of the Court of Wards Act, 1879, as amended by s 7 of Bengal Act III of 1881, the lower Appellate Court was right in dismissing the suit. *Held*, also, that the sanction given after appeal did not have a retrospective effect. DINESH CHUNDER ROY *v.* GOLAM MOSTAPHA. DINESH CHUNDER ROY *v.* FAHAMIDUNNESSA BEGUM. DINESH CHUNDER ROY *v.* NISHI KANT GUNGOPADHYA 89

Covenants. Power to enter into. *See* REGISTRAR OF HIGH COURT, AUTHORITY OF 330

Criminal Procedure Code, 1882, s. 35. *See* SENTENCE 442

———, **s. 106.** *See* RECOGNIZANCE TO KEEP PEACE ... 779

———, **ss. 134, 144**—*Penal Code*, s. 188—*Disobeying order of Public Servant—Trader at Hât—Order prohibiting holding of Hât.*] A District Magistrate by an order made under s. 144 of the Criminal Procedure Code, after stating that it appeared that one "*G G S* has recently established a hât at *S* in the vicinity of *K*, an old-established hât, and held it on the same days, and that in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât instead of the old one, a serious breach of the peace or riots are imminent," ordered "that the said *G C S* and all other persons abstain from holding such hât" on those days. The order was duly made and promulgated, but not strictly in accordance with s. 134 of the Code, and the orders of Government made thereunder. Notwithstanding the order one *P C A*, was found exposing goods, for sale as a trader at the hât on one of the prohibited days, and he was thereupon charged with disobeying the order of the Magistrate, and convicted of an offence under s. 188 of the Penal Code: *Held*, that the conviction was bad, as *P C A* did not come within the description of the persons intended by the order to be prohibited from "holding" the hât, which referred to "holding" as owner or manager, not as a trader. *Held*, also that the terms of s. 134 of the Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order: where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code. IN THE MATTER OF THE PETITION OF PARBUTTY CHARAN AICH. PARBUTTY CHURN AICH *v.* QUEEN-EMPRESS 9

———. **s. 144**, *See* SUPERINTENDENCE OF HIGH COURT ... 80

———, **s. 144**—*Order to abstain from certain act.*] A Deputy Commissioner passed an order under s. 144 of the Criminal Procedure Code prohibiting a person from collecting, or attempting to collect, any rent, either herself, or through any of her officers or servants, from the ryots of two specified pergunnahs, and also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers on an estate, erecting any *adda* or *kachari* in such pergunnahs for a period of two months. Upon an application to set aside such order: *Held*, that the acts which the petitioner was directed to abstain from were not acts which come within the meaning of the words "a certain act" as used in s. 144 of the Code of Criminal Procedure, and that the order should be set aside. ABAYESWARI DEBI *v.* SIDHESWARI DEBI 80

———, **s. 145**—*Dispute as to right to collect rents—Tangible immoveable property.*] A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code, and the opera-

Criminal Procedure Code, s. 145—*Contd.*
tion of that section cannot be limited by any rule which would depend upon the area of the property in dispute. Where, in such a dispute, which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses, on the ground that the enquiry would extend to an inordinate length and be extremely expensive, and passed an order under the section:—*Held*, that even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers. *Held*, further, that a payment of rent for a short time to the petitioner, even if proved, would not amount to dispossession of the opposite party. *Sarbananda Rasu Mozumdar* v. *Pran Sankar Roy Chowdhuri*, I. L. R., 15 Calc., 527, followed. ABEHAYESSARI DEBI *v.* SHIDHESSARI DEBI 513

——————————, **s. 145**—*Possession, Inquiry into—Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.*] In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest land, the right to possession of which was exercised by cutting and removing timber from time to time, the Magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings, and continued to the date of the hearing; and that the men of the second party had been able to bring out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been established, and made an order under the section in their favour: *Held*, that, having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted. *Held*, further, that in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one on which the dispute arose; and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced. JAGAT KISHORE ACHARJYA CHOWDHURI *v.* KHAJAH ASHANULLAH KHAN BAHADUR 261

——————————, **s. 161.** *See* FALSE EVIDENCE 349

——————————, **ss. 161, 172, 211** — *Statements of witnesses recorded by Police officers investigating under Chap. XIV, Criminal Procedure Code, Right of accused to call for and inspect—Police Diaries.*] Statement of witnesses recorded by a Police officer while making an investigation under s. 161 of the Criminal Procedure Code, form no portion of the Police diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon. BIKAO KHAN *v.* QUEEN-EMPRESS 610

MAHOMED ALLI HADJI *v.* QUEEN-EMPRESS 612 *note*

——————————, **ss. 182, 532.** *See* JURISDICTION OF CRIMINAL COURT 667

——————————, **s. 195.** *See* SANCTION TO PROSECUTION ... 730

——————————, **s. 195.** *See* SESSIONS JUDGE, JURISDICTION OF ... 766

——————————, **s. 195**—*Sanction to prosecute—Notice to accused—Revisional power, Exercise of, by High Court.*] When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not. A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted." There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications. The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the fol-

Criminal Procedure Code, s. 195—*Contd.*
lowing day without notice to and in the absence of, the complainant or his attorney, and the Magistrate granted the sanction asked for. On an application to the High Court to revoke the sanction: *Held*, that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard. *Held*, further, that the mere fact of the charge laid by the complainant not having been proved, was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction it should be revoked. KEDAR NATH DAS *v.* MORESH CHUNDER CHUCKERBUTTY 661

——————— **s. 260.** *See* SUMMARY TRIAL 715

——————, **s. 411.** *See* APPEAL IN CRIMINAL CASE ... 799

——————, **s. 429.** *See* RECOGNIZANCE TO KEEP PEACE ... 779

——————, **ss. 439, 476.** *See* SANCTION TO PROSECUTION... 730

——————, **s. 487.** *See* SESSIONS JUDGE, JURISDICTION OF 766

——————, **s. 487**—*Judicial proceedings—Sanction to prosecute—Criminal Appeal, Hearing of by District Judge who has granted sanction to prosecute—Penal Code, s. 210.*] A complainant applied to a Munsiff for sanction to prosecute a decree-holder for an office under s. 210 of the Penal Code, and upon the Munsiff's refusing such application, preferred an appeal to the District Judge, who granted the sanction asked for. The decree-holder, having been prosecuted and convicted before a Deputy Magistrate, preferred an appeal, which came on for hearing before, and was disposed of by, the same District Judge who had granted the sanction: *Held*, that the words "shall try any person," as used in s. 487 of the Code of Criminal Procedure, include the hearing of an appeal, and that the hearing of the appeal from the order of the Munsiff refusing sanction was a judicial proceeding within the meaning of the Code, and consequently that, under the provisions of s. 487, the District Judge had no jurisdiction to entertain the appeal against the judgment and sentence passed by the Deputy Magistrate. IN THE MATTER OF MADHUB CHUNDER MOZUMDAR *v.* NOVODEEP CHUNDER PUNDIT 121

——————— **s. 488**—*Evidence Act (I of 1872), s 120—Bastardy proceeding—Order of affiliation—Evidence—Competent witness—Maintenance. Order of Criminal Court as to.*] Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings, within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf. Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his *nika* wife, whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced, including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section: *Held*, that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant, but, as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not. NUR MAHOMED *v.* BISMULLA JAN 781

——————, **s. 551**—*Unlawful detention for an unlawful purpose—Infant, Custody of.*] A Hindu girl, under the age of 14 years, went of her own accord to a Mission House where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551 of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother. *Held*, upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of those words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her. *Held*, also, that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves,

Criminal Procedure Code, s. 551—*Contd.*
might only become so when entertained towards a child, in opposition to the wishes of its guardian, but that the purpose, whether entertained towards a woman or a female child, must be in itself unlawful. *Held*, consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order. *Held*, further, that, although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that, having regard to the circumstances of the case, there was nothing to justify such an order being passed. ABBAHAM *v.* MAHTABO ... 487

Criminal Trespass. *See* PENAL CODE, ss. 441, 456 657

——————*Penal Code* (*Act XLV of* 1860), *s*, 447.] During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting: *Held*, that their actions amounted to criminal trespass. GOLAP PANDEY *v.* BODDAM 715

Cross-demand arising out of same Transaction. *See* SET-OFF ... 711

Currency Notes, Application for payment of lost halves of. *See* ATTEMPT TO COMMIT OFFENCE ... 310

Custom. *See* CONTRACT, CONSTRUCTION OF 417

——————. *See* SALE BY AUCTION ... 702

Damages *See* INJUNCTION 252

—— ——. *See* RES JUDICATA 545

Damages, Right of Licensee to. *See* RIGHT OF USER 640

Debt not in Schedule. *See* INSOLVENCY 85, 592

——, **Omission to come in and prove.** *See* INSOLVENCY 592

Declaration of Specific Rights. *See* PARTITION 117

Decree—*Form of decree—Construction of Mortgage bond—Liability of property other than that mortgaged.*] Under a mortgage bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor: *Held*, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties. *Narotam Dass* v. *Sheopargash Singh*, I. L. R., 10 Calc., 740, referred to. BUNSEEDHUR *v.* SUJAAT ALI 540

——————*Form of decree—Suit on Bill of Exchange—Civil Procedure Code* (*Act XIV of* 1882), *ss.* 532, 538—*Negotiable Instruments Act* (*XXVI of* 1881), *s.* 35.] A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement had been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liablity until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal. BANK OF BENGAL *v.* KARTICK CHUNDER ROY 804

Decree against person having Life Interest. *See* EXECUTION OF DECREE 511

Decree against Widow representing Estate. *See* EXECUTION OF DECREE 40

Decree, Satisfaction of. Agreement to give time for. *See* CIVIL PROCEDURE CODE, 1882, s. 257A ... 504

Decree unsatisfied by sale of Mortgaged Property. *See* TRANSFER OF PROPERTY ACT, ss. 88, 90 ... 423

Decree-holders, Purchase by. *See* SALE IN EXECUTION OF DECREE ... 132

Deed of which Registration is optional. Transfer by. *See* TRANSFER OF PROPERTY ACT, s. 54 622

Defaulting purchaser, Liability of, for loss by re-sale. *See* CIVIL PROCEDURE CODE, 1882, s. 293 ... 535

Defects of title known to purchaser at time of Sale. *See* REGISTRAR OF HIGH COURT, AUTHORITY OF ... 330

Delivery, Failure of. *See* CONTRACT, CONSTRUCTION OF 417

Demand. *See* LIMITATION ACT, 1877, ARTS. 59 AND 60 25

Deposit. *See* LIMITATION ACT, 1877, ARTS. 59 AND 60 25

Deputy Commissioner. *See* JURISDICTION 13

Description of Property at time of sale and re-sale, Difference of. *See* CIVIL PROCEDURE CODE, 1882, s. 293 535

Detention for Unlawful purpose. *See* CRIMINAL PROCEDURE CODE, 1882, s. 551 487

Disclaimer of title by real owner. *See* PARTIES 364

Dismissal of suit for default. *See* RES JUDICATA 98

Dispossession or Discontinuance of Possession. *See* LIMITATION ACT, 1877, ART. 142 473

Dispute as to right to Collect Rents. *See* CRIMINAL PROCEDURE CODE, 1882, s. 145 513

Distinct Offences. *See* SENTENCE ... 725

District Court. *See* JURISDICTION ... 13

——— **Judge.** *See* APPEAL ... 31

———, **Jurisdiction of, to hear Appeal.** *See* CRIMINAL PROCEDURE CODE, 1882, s. 487 121

———, **Sanction to Prosecute by.** *See* SESSIONS JUDGE, JURISDICTION OF 766

Document not compulsorily registrable. Suit to compel registration of. *See* REGISTRATION ACT, 1877, s. 77 509

Enhancement of Rent—*Settlement of a Government Khas Mehal—Regulation VII of* 1822—*Bengal Act III of* 1878—*Bengal Act VIII of* 1879, *ss.* 10—14.] In order to make the enhanced rent, stated in a *jummabundi*, settled under Regulation VII of 1822, binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law, with reference to enhancement of rent, in force at the time of such enhancement. *D'Silva v. Raj Coomar Dutt*, 16 W. R., 153, *Enayetoollah Meah v. Nubo Coomar Sircar*, 20 W. R., 207, and *Rezzoodeen Mahomed v. McAlpine*, 22 W. R., 540, followed. The rent of a Government Khas Mehal can only be enhanced by the same process as the rent on any private estate. AKSHAYA COOMAR DUTT *v.* SHAMA CHARAN PATITANDA 586

Estoppel. *See* BENAMI TRANSACTION 137, 148

———. *See* RES JUDICATA 173, 300

Evidence. *See* CRIMINAL PROCEDURE CODE, 1882, s. 488 781

———. *See* RES JUDICATA ... 300

Evidence—*Costs.*] One of two co-sharers by ancestral title in the under-proprietary right in certain villages, obtained, in 1870, decrees against the talukdar for sub-settlement, and getting possession had his name entered in the *khewat*. The other co-sharer remained entitled to claim that this possession was held partly for him. The present suit was brought upon two agreements, purporting to have been made in 1870, between the two co-sharers, while proceedings to obtain the above decrees were pending, to the effect that, whereas both had claims against the talukdar, one only was to sue him, the other paying half of the costs and being entitled to receive half of what might be decreed. The Judicial Committee, upon the evidence, concluded that the Appellate Court, attributing too much to certain omissions and acts on the plaintiff's part which were more or less explained, had erred in reversing the decree of the first Court, which maintained the agreements, depriving the plaintiff of his costs in that Court only. MUHAMMAD YUSUF *v.* MUHAMMAD HUSAIN 62

——— ——— *Evidence Act* (*I of* 1872), *ss.* 65, 66—*Admission of secondary evidence—Copy of document*] On an appeal to the Judicial Commissioners from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only questions were (1) whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2) whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document. Both the above questions were decided in the affirmative by their Lordships: the *first*, on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (I of 1872), ss. 65, 66: the *second*, also in the affirmative, because the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there endorsed, "copy" in accordance with the original," signed by the Judge who presided in the Court, who alone was authorised to compare and accept such copy, there were grounds for considering it genuine. LUCHMAN SING *v.* PUNA ... 753

——— ——— *Thak-Maps—Boundary—Title, Question of.*] The sole question for determination being a question of the boundary of two taluqs, the Judge hearing the case refused to give effect to a certain thak-map which had been prepared in 1859, and upon the face of which appeared what were admitted by the parties then owning the taluqs to be the boundary lines of the taluqs at the time; no evidence was given showing that these boundary lines had ever been altered: *Held*, that the map was clearly evidence of what the boundaries of the properties were at the time of the permanent settlement, and also as to what they admittedly were in 1859. SYAMA SUNDERI DASSYA *v.* JOGOBUNDHU SOOTAR 186

——— ——— **Act (I of 1872), ss. 65, 66.** *See* EVIDENCE 753

———, **s. 74**—*Jummabundi—Public Document.*] *Quære*:—Whether a *jummabundi* is a public document? AKSHAYA COOMAR DUTT *v.* SHAMA CHARN PATITANDA 586

———, **s. 85.** *See* PRACTICE 776

Evidence Act (I of 1872).—*Continued.*

——————————, s. 120.
See CRIMINAL PROCEDURE CODE, 1882, s. 488 781

Excise Act (Bengal Act VII of 1878)—*Revenue, Protection of—Contract Act (IX of 1872), s. 23—Public Policy.*] The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well. An agreement, therefore, for the sale of fermented liquors, entered into by a person who has not obtained a license under that Act is void and cannot be recovered on. BOISTUB CHURN NAUN *v.* WOOMA CHURN SEN ... 436

——————————, ss. 60, 74—*"Like offence"—Punishment on second or subsequent conviction under Bengal Excise Act—Selling retail with wholesale license.*] The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term "like offence," as used in s. 74 of the Bengal Excise Act. *Ram Churn Shaw v. The Empress*, I. L. R., 9 Calc., 575, followed. SCHEIN *v.* THE QUEEN EMPRESS 799

Execution of Assigned Decree. *See* SET-OFF 619

Execution of Decree. *See* CIVIL PROCEDURE CODE, 1882, s. 230 16

—————————— *See* INSOLVENCY ... 85

—————————— *See* LIMITATION ACT, 1877, ART. 179 598

—————————— *Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.*] A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate: *Held*, that, as liability under the decree made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey v. Shamasoondery Debia*, 3 Moore's I. A., 229, referred to, and applied in this case. *Held*, also, that the minor, by his adoptive mother as his guardian, was

Execution of Decree—*Continued.*

liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor. *Sureshchunder Wum Chowdhry v. Jugutchunder Deb*, I. L. R., 14 Calc. 204, approved. HARI SAHAN MOITRA *v.* BHUBANESWARI DEBI 40

—————————— *Personal decree against person having life interest—Decree for arrears of rent—Hindu law.*] A decree for arrears of rent was obtained by *H* against *B*, a daughter in possession for a life estate of property inherited from her father *R*. On the death of *B*, this property was taken by her two sons as heirs of her father *R*. The decree was for arrears which had accrued during the lifetime of *B*, and the sons had been substituted for *B* as judgment-debtors. On an application for execution of the decree: *Held*, on the principle laid down in *Baijun Doobey v. Brij Bhookun Lall Awusti*, L. R., 2 I. A., 275; I. L. R., 1 Calc., 133, that the debt was a personal debt, payment of which could be enforced only against the property left by *B*. The decree, therefore, could not be executed against the property inherited by the sons from *R*. *Hurry Mohun Rai v. Gonesh Chunder Doss*, I. L. R., 10 Calc., 823, distinguished. KRISTO GOBIND MAJUMDAR *v.* HEM CHUNDER CHOWDRY. KRISHNA GOPAL MAJUMDAR *v.* HEM CHUNDER CHOWDRY ... 511

—————————— *Security for Costs—Security Bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), s. 549—Act VII of 1888, s. 46—General Clauses Act (I of 1868), s. 6.*] On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s 6 of the General Clauses Act rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force; *held*, on appeal, that the application should have been allowed. ABDUL WAHAB *v.* FAREEDOONNISSA 323

—————————— *Transfer by operation of law—Civil Procedure Code (Act XIV of 1882), s. 232—Right of procedure—Execution under Bengal Act VIII of 1869 and Act VIII of 1885.*] Upon the death of the full owner, the mother took out probate of a will in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked; but, while the mother was in possession of the estate as executrix, she

Execution of Decree—*Continued.*
sued and obtained a decree for rent under Bengal Act VIII of 1869. Upon the application of the minor for the execution of the decree: *Held*, that the minor was in a position to execute the decree, his succession to the estate of his father being a succession or *transfer by operation of law* within the meaning of s. 232 of the Code of Civil Procedure. *Held*, also, that the mode in which the decree was executed under the old Rent Act (Bengal Act VIII of 1869) was in so far as it was a right at all that belonged to the judgment-creditor, not a private right, but a mere right of procedure, and the execution was therefore to be governed by Act VIII of 1885. UMASOONDURY DASSY *v.* BROJONATH BHUTTACHARJEE 347

——————————*Transfer of decree for execution—Jurisdiction—Civil Procedure Code* (*Act XIV of* 1882), *ss.* 6 *and* 223.] Having regard to the provisions of s. 6 of the Code of Civil Procedure, a Civil Court has no jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code, when the decree has been passed in a suit the value or subject-matter of which is in excess of the pecuniary limits of its ordinary jurisdiction. *Narasayya* v. *Venkata Krishnayya*, I. L. R., 7 Mad., 397, dissented from; *Sidheshwar Pandit* v. *Harihar Pandit*, I. L. R., 12 Bom., 155; *In re Balaji Ranchoddas*, I. L. R., 5 Bom., 680; and *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, I. L. R., 8 Calc., 51, referred to. GOKUL KRISTO CHUNDER *v.* AUKHIL CHUNDER CHATTERJEE. IN THE MATTER OF THE PETITION OF ISHAN CHUNDER DAS. RASHARAJ BOSE *v.* GOBINDA RANI CHOWDHRANI. MOOLA KUMARI BIBEE *v.* MOOL CHAND DHAMANT. BISSUN CHAND DOODHURIA *v.* MOOL CHAND DHAMANT ... 457

——————————*Transfer of decree for execution—Civil Procedure Code*, 1882, *s.* 223—*Jurisdiction.*] Section 223 of the Code of Civil Procedure, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to *another Court*, should be interpreted to mean, another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. *Narasayya* v. *Venkata Krishnayya*, I. L. R., 7 Mad., 397, dissented from. DURGA CHARAN MOJUMDAR *v.* UMATARA GUPTA 465

——————————**fraudulent, after uncertified Adjustment.** *See* PENAL CODE, s. 210 126

——————————**Question relating to.** *See* CIVIL PROCEDURE CODE, 1882, s. 244 1

——————————**Document, Denial of.** *See* REGISTRATION ACT, 1877, ss. 22, 24, 76, 77 189

Ex parte Decree, Effect of. *See* RES JUDICATA 300

——————————**, Order setting aside.** *See* APPEAL 426

Facts, Finding on, Interference with. *See* SECOND APPEAL 645

False Evidence—*Alternative Charges—Statement made to Police Officer investigating case—Penal Code* (*Act XLV of* 1880), *ss.* 191, 193—*Criminal Procedure Code* (*Act X of* 1882), *s.* 161.] An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police officer investigating a case of arson, and the other having been made when he was examined as a witness before the Joint Magistrate when the case was being enquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police officer was engaged, was to the effect that an inquiry was being made about the burning of a house. The jury acquitted the accused and the case was referred to the High Court by the Sessions Judge who disagreed with the verdict of acquittal: *Held*, that the verdict was right. Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police officer was a statement in answer to questions put to the accused by the investigating police officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained. *Held*, further, that in such a case it is also necessary for the prosecution to establish that the police constable was making an investigation under Chap. XIV of the Criminal Procedure Code THE EMPRESS *v.* BAIKANTA BAURI ... 349

Foreclosure, Decree for. *See* REDEMPTION, RIGHT OF 246

Fractional Shareholders in undivided estate. Lien of. *See* CO-SHARER 329

Fraud. *See* SALE FOR ARREARS OF REVENUE 194

Gazette, Notification in. *See* APPEAL... 426

General Clauses Consolidation Act (I of 1868), s. 6. *See* BENGAL TENANCY ACT, s. 170 267

s. 6. *See* EXECUTION OF DECREE ... 323

Gift. *See* HINDU LAW, GIFT 677

——**over after Life Interest.** *See* HINDU LAW, WILL 383

——**to "Persons and heirs male of their Bodies."** *See* HINDU LAW, WILL 383

Government Khas Mehal. Settlement of. *See* ENHANCEMENT OF RENT ... 586

Grant, Construction of—*Invalidity of grant or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.*] A Hindu owner cannot make a conditional grant of a future interest in property in favour of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant. The purpose was to oblige the grantor and the successors in a Raj estate to give in some way and other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favour of non-existing covenantees, to give the villages to them in the event specified: *Held*, that in either view it was equally ineffectual. *Held*, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendants you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance. CHUNDI CHURN BARUA *v.* SIDHESWARI DEBI 71

"Granting" Application, Meaning of. *See* CIVIL PROCEDURE CODE, 1882, s. 230 744

Grievous Hurt. *See* SENTENCE ... 442

Guardian. *See* HINDU LAW, GUARDIAN... 584

————, Power of. *See* MAHOMEDAN LAW, GUARDIAN 627

———— ad litem, Application by next Friend of Minor Defendant, before appointment of. *See* PRACTICE 771

Hat, Order prohibiting holding of. *See* CRIMINAL PROCEDURE CODE, 1882, ss. 134, 144 9

Heir when bound by Acts of Ancestor. *See* BENAMI TRANSACTION ... 137

High Court, Power of, in revision. *See* SANCTION TO PROSECUTION ... 730

Hindu Law. *See* EXECUTION OF DECREE 511

Hindu Law. *See* GRANT, CONSTRUCTION OF 71

————Adoption—*Invalid agreement relating to estate of adopted son—Conditional adoption.*] A talukdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riasat*. This power having been exercised, the adoption was questioned on the ground that the widow had agreed with the natural father of the adopted son that she should retain the whole estate during her life: *Held*, that this had not rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void without invalidating the adoption. BHASBA RABIDAT SINGH *v.* INDAR KUNIWAR 556

————Gift—*Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her to two donees, one of whom could not take.*] A clause in the wajib-al-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter being to modify the law otherwise prevailing, *viz.*, the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer: *Held*, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to that daughter's daughter, the gift being of more than the donor would have taken as a widow. The gift was to the daughter and to her husband jointly: *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey v. Taylor*, Ambler, 138, which, not depending on any peculiarity of English law, was applicable here. NANDI SINGH *v.* SITA RAM ... 677

————Guardian—*Right to guardianship of Hindu widow—Grant of certificate of administration under Act XL of* 1858.] The relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. A certficate of administration, under Act XL of 1858, was therefore granted to one of the former in preference to the latter. KHUDIRAM MOOKERJEE *v.* BONWARI LAL ROY 584

————Inheritance—*Brother's widow—Survivorship—Benares School of law.*] According to the law and usage of the Benares School

Hindu Law, Inheritance—*Continued.*

of Hindu law, a brother's widow has no place in the line of heirs; nor is she entitled to succeed by right of survivorship. *Bhugance Daiee* v. *Gopaljee*, 1 S. D. A., N.-W. P. (1862), 306, not followed; *Ananda Bibee* v. *Nownit Lal*, I. L. R., 9 Calc., 315, followed in principle. JOGADAMBA KOER *v.* SECRETARY OF STATE FOR INDIA 67

——— **Joint family**—*Alienation by one of members—Sale by co-parcener, Effect of—Mitakshara law.*] A sale by one member of a joint family held to be bad under the Mitakshara law, as being an appropriation by him, without any partition, of joint family property. CHUNDER COOMAR *v.* HURBUNS SAHAI 137

——— **Partition**—*Inheritance of talukdari estate in Oudh—Sanad recognizing primogeniture—Effect of as to existing rights of inheritance—Shares held by members of family—Mesne profits on specific and definite share.*] The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition. A talukdari estate which, before and after annexation, was subject to the common Hindu law of Oudh, *viz.*, the Mitakshara, was restored after the general confiscation of 1858, to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards in 1861 was issued a primogeniture sanad of the above talukdari estate. This sanad could not prevail against the family rights of inheritance; and effect was given to family arrangements, with the same result as regards the two villages. On the contention that the family, by the effect of the sanads, was to have one head and sole manager in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture: *Held*, that this kind of managership was entirely unknown to the common Hindu law of Oudh; and that apparently, the Oudh Estates Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was accordingly decreed to the members of the family suing for it. *Prithi Pal Singh* v. *Jawahir Singh*, I. L. R., 14, I. A., 37; I. L. R., 14 Calc., 493, as to the right to partition of a talukdari estate, referred to and followed; also the same case in regard to profits,

Hindu Law, Partition—*Continued.*

where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family. SHANKAR BAKSH *v.* HARDEO BAKSH 397

——— *Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.*] When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavahana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share as shares, allotted to the son or sons of whom she is the mother. *Jeeomony Dossee* v. *Attaram Ghose* (Macnaghten's Cons. H. L., p. 64) referred to and approved. HEMANGINI DASI *v.* KEDARNATH KUNDU CHOWDHRY 758

——— **Widow**—*Accumulations—Period up to which accumulations may be dealt with—Intention to accumulate.*] Under the will of *N. C. M.* the testator left his estate to his brother, provided that, within a term of eight years, no son should be born to such brother, capable of being adopted as a son of the testator, in accordance with certain conditions made in the will. These conditions failed, and, on the expiration of the term of eight years, the estate vested in the brother. The will made no provision for disposal of the rents and profits of the estate during the period the succession thereto was in abeyance. Disputes having arisen between the widow of the testator and his brother, as to the right to such rents and profits, the brother eventually agreed to pay, and did pay, over to the widow, a large sum by way of settlement of these disputes, for which sum the widow executed a release. The widow invested the sum so received in Government Securities, and twenty years afterwards created, with this fund, a trust in favour of one *G. C. R.*, and appointed *B.* trustee thereof. On the death of the widow, the daughter of the testator tried to set aside this trust, claiming the funds as a portion of the father's estate with which the widow had no right to deal: *Held* that, as the accumulations were handed over to the widow by the person entitled to the reversion after the estate had vested in him, and a release had been entered into between them, no presumption arose that the fund in question had been accumulated by the widow for the benefit of other heirs of the testator, and that there being no such presumption, the facts of the case must be

Hindu Law, Widow—*Continued.*
looked at to ascertain the intention of the parties regarding this fund; *held*, as to this, that the conduct of the widow evidenced no intention to accumulate the sum received by her for the benefit of any person but herself, or that she ever intended to give up the power of disposing, expending, or dealing with it in any way. SOWDAMINI DASSI *v.* BROUGHTON ... 574

——— **Will**—*Construction of Will—Successive interests bequeathed—Gift over after life-interest—Construction of gift to persons, and the heirs male of their bodies.*] A will cannot institute a course of succession unknown to the Hindu law; and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: *first*, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mullick case*: *Soorjeemoney Dossee* v. *Dinobundoo Mullick*, 9 Moore's I. A., 123). *Secondly*, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*: *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*, L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid. A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been born), making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime: *Held*, that the gift of the residue so far as it purported to confer an estate of inheritance on the half-brothers and the heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was capable of taking effect: that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff: and that, accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed. KRISTOROMONI DASI *v.* NARENDRA KRISHNA BAHADUR 383

Hindu Law, Will—*Continued.*

——— **Widow, Maintenance of.** *See* HINDU LAW, PARTITION 758

——— **Widow, Power of alienation of.** *See* HINDU LAW, GIFT 677

——— **Widow, Right to guardianship of.** *See* HINDU LAW, GUARDIAN ... 584

——— **Wills' Act (XXI of 1870), ss. 2, 3.** *See* SUCCESSION ACT, s. 96 ... 549

House-breaking by night. *See* PENAL CODE, ss. 441, 456 657

Illegal Contract. *See* CIVIL PROCEDURE CODE, 1882, s. 257A 504

Immoveable Property, Transfer of, by unregistered deed. *See* TRANSFER OF PROPERTY ACT, s. 54 622

Infant, Custody of. *See* CRIMINAL PROCEDURE CODE, 1882, s. 551 ... 487

Inheritance in a Village Community in Oudh. *See* HINDU LAW, GIFT ... 677

Injunction—*Mandatory injunction—Damages—Light and air—Ancient lights.*] Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted. Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief, *Jamnadas Shankarlall* v. *Atmaram Harjivan*, I. L. R., 2 Bom., 138, referred to. The law regarding relief by mandatory injunction explained. BENODE COOMAREE DOSSEE *v.* SOUDAMINEY DOSSEE 252

Insolvency—*Civil Procedure Code*, 1882, *ss.* 336, 337—*Act VI of* 1888—*Debt not in schedule—Execution of decree obtained against insolvent for such debt—Scheduled debts.*] A person, who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is in the hands of the Receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VI of 1888). PANNA LALL *v.* KANHAIYA LALL 85

Insolvency—*Insolvent debtors under Civil Procedure Code—Civil Procedure Code, ss.* 344, 350, 352, 357, 358—*Debt not in schedule—Omission to come in and prove debt,*] A judgment-debtor, arrested in execution of a decree, filed his petition and was adjudicated an insolvent, under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend; and her name was not included in the schedule of creditors. The insolvent was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent: *Held*, that the discharge of the insolvent did not operate as a discharge of the debt under s. 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property. *Semble*:—Under s. 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him, unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them. HARO PRIA DABIA *v.* SHAMA CHARAN SEN 592

Insolvent Judgment-debtors. *See* JURISDICTION 13

Insurance—*Marine Insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.*] An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped: *Held*, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendants' agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy. BHUGWAN DAS *v.* NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA ... 564

Intention, Presumption of. *See* PENAL CODE, ss. 441, 456 657

——————to Preserve Prior Security. *See* MORTGAGE 523

"Intestate," Meaning of. *See* OUDH ESTATES' ACT (I OF 1869), s. 13 ... 536

Judgment. *See* APPEAL 788

Judgment-Debtor not appealing, Execution against. *See* LIMITATION ACT, 1877, ART. 179 598

——————, Representative of. *See* CIVIL PROCEDURE CODE, s. 244 ... 355

Judicial Proceeding. *See* CRIMINAL PROCEDURE CODE, 1882, s. 487 ... 121

Jummabundi. *See* EVIDENCE ACT (I OF 1882), s. 74 586

Jurisdiction. *See* EXECUTION OF DECREE 457, 465

———————*Deputy Commissioner—District Court—Insolvent judgment-debtors—Civil Procedure Code,* 1882, *ss.* 344, 360—*Application to have judgment-debtor declared insolvent—Costs.*] The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under ss. 2 and 344 of the Civil Procedure Code. A Deputy Commissioner, therefore, invested by the local Government with powers under s. 360 of the Code, has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent. *In re Waller*, I. L. R., 6 Mad., 430, and *Purbhudas Velji v. Chugan Raichand*, I. L. R., 8 Bom., 196, followed. The question of jurisdiction not having been raised in the lower Court the order was set aside without costs. JOYNARAYAN SINGH *v.* MUDHOO SUDUN SINGH 31

——————of Civil Court. *See* PARTITION 203

——————Criminal Court—*Tributary Mehals, Khoonjur—"Local Area"—Code of Criminal Procedure* (*Act X of* 1882), *ss.* 182 *and* 531.] The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur, which is on precisely the same footing in that respect as Mohurbhunj. Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and, on appeal to the Sessions Judge, the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the territory of Kheonjur: *Held*, that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside. *Held*, further, that ss. 182 and 531 of the Criminal Procedure Code had no application to the case. The words "local area," used in s. 182, only apply to a "local

Jurisdiction of Criminal Court—*Continued.*
area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other portions of the British Empire to which the Code has no application; and similarly s. 531 only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure. IN THE MATTER OF BICHITRANUND DASS *v.* BHUGGUT PERAL. IN THE MATTER OF BICHITRANUND DASS *v.* DUKHIA JANA 667

Kheonjur, Criminal Law in. *See* JURISDICTION OF CRIMINAL COURT ... 667

Land Acquisition (Act X of 1870), s. 39. *See* APPEAL 31

Landlord and Tenant—*Long continuance of a tenancy at a low and unvaried rent—Zemindar's right against tenant—Origin and special purpose of the tenancy—Cessation to use the land for such purpose—Burden of proving permanent tenure—Inference of tenancy-at-will, or from year to year.*] The evidence having shown the origin and particular purpose of a tenancy, long continued at a low and unvaried rent, *viz.*, from 1798 until 1873, when the tenant ceased to use the land for the purpose: *Held*, that it was not to be inferred from that evidence that an agreement had been made between the parties that the tenant should hold a permanent tenure; and *held*, that, on such cessation, the tenant could only resist a suit to eject him by proving, or giving grounds for the inference of an agreement with the owner of the land that he should have something more of a lease than the ordinary tenancy-at-will, or from year to year; also, that the facts here presented did not lead to that inference. SECRETARY OF STATE FOR INDIA *v.* LUCHMESWAR SINGH... 223

——— **Effect of Resumption Decree as creating or not relation of.** *See* LIMITATION ACT, 1877 ART. 130 ... ... 449, 450 *note.*

Land Registration Act (Bengal Act VII of 1876), s. 78—*Suit for rent by unregistered proprietor—Application for registration as proprietor.*] Section 78 of the Land Registration Act, 1876, precludes a person claiming as proprietor from suing a tenant for rent until his name has been actually registered as such under the Act. A mere application to be registered is not sufficient for the purpose. SURYA KANT ACHARYA BAHADUR *v.* HEMANT KUMARI DEVI 706
DHORONIDHUR SEN *v.* WAJIDUNNISSA KHATOON ... ... 708 *note.*

Landslet for Building Purposes. *See* RIGHT OF OCCUPANCY 652

Lapsed Legacy. *See* SUCCESSION ACT, s. 96 549

Leave to Bid. *See* SALE IN EXECUTION OF DECREE 132

Leave to Bid. Effect of, on purchase by Mortgagee. *See* MORTGAGOR AND MORTGAGEE 682

Lessor, Title of. *See* VENDOR AND PURCHASER 414

Letters of Administration, Application for. *See* PRACTICE 776

——— **Patent, High Court, 1865, cl. 15.** *See* APPEAL 788

——— **cl. 26.** *See* MERCHANT SHIPPING ACT, 1854, s. 267 238

Liability of property to be sold in execution. *See* CIVIL PROCEDURE CODE, 1882, s. 244 603

License, Revocation of. *See* RIGHT OF USER 640

——— **to use land of another, coupled with grant.** *See* RIGHT OF USER ... 640

Lien on tenure for share of rent. *See* CO-SHARER 326

Light and Air. *See* INJUNCTION ... 252

"Like Offence." *See* EXCISE ACT, ss. 60, 74 799

Limitation, *See* ARBITRATION ... 806

——— ——— *See* CIVIL PROCEDURE CODE, 1882, s. 230 16

——— ——— *See* PARTITION 117

——— ——— *Bengal Tenancy Act* (*VIII of* 1885), *Sch. iii, art. 3*—*Suit by occupancy ryot to recover possession after dispossession by landlord—Question of title—Possessory suits—Bengal Act VIII of* 1869, *s* 27.] A suit by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord, in which the title of the tenant is denied and put in issue, is governed by the special period of limitation prescribed by the Bengal Tenancy Act, sch. iii, art 3, namely, two years from the date of dispossession. It was intended by that enactment to provide for all suits to recover possession of land brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff; and not to provide only for suits of a possessory nature such as were previously dealt with by s. 27 of Bengal Act VIII of 1869. SARASWATI DASI *v.* HORITARUN CHUCKERBUTTI 741

——— ——— **Act, 1877, s. 10**—*Trust—Position, as regards the daughters, of sons managing Estate of deceased Mahomedan.*] A solehnama in 1847 to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. In a suit in 1882 to set aside the

Limitation Act, 1877, s. 10—*Continued.*
solehnama at the instance of the two daughters, the evidence showed that the sons managed the property after their father's death, and at the time the solehnama was executed : *Held*, on the question of limitation, that it was not to be inferred that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters ; and, therefore, s. 10 of Act XV of 1877 was inapplicable. So that as regards the property included in the solehnama a suit brought in 1882 by the daughters would be barred by time. MAHOMED ABDUL KADIR *v.* AMTAL KARIM BANU 161

——————————— **Arts. 59 and 60** —*Money deposited—Banker and Customer—Money lent—"Deposit"—"Trust"—Cause of action—Demand.*] The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886 : *Held*, that s. 60 and not s. 59 of the Limitation Act was applicable to the case ; the cause of action therefore arose at the date of the demand and the suit was not barred. The dictum of WHITE, J., in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi*, 6 C. L. R., 470, that "the word 'deposit' in the Limitation Act as distinct from 'loan' points to cases where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from. ISHUR CHUNDER BHADURI *v.* JIBUN KUMARI BIBI 25

——————————— **Art. 130**—*Suit for assessment of rent on lakheraj land after decree for resumption—Effect of decree as creating or not relationship of landlord and tenant.*] The plaintiff brought a suit in 1861 against *C* for resumption of, and for declaration of his right to assess rent upon, *C's* lands within his zemindari which *C* held as *lakheraj*. That suit was presumably instituted under Regulation II of 1819, s. 30, which related only to resumption of *lakheraj* lands existing prior to 1790, but there was nothing to show conclusively under what law it was instituted, or whether the *lakheraj* grant was one subsequent or anterior to 1790. In that suit an *ex parte* decree was passed in 1863 that "the suit be decreed, and the land in dispute be declared to be *shukur*," *i.e.*, liable to assessment. In a suit brought

Limitation Act, 1877, Art 130.—*Contd.*
in 1886 against the representatives of *C*, after serving a notice upon them to pay rent for the land at a certain rate, to assess the land at the rate mentioned in the notice, and for the recovery of rent at that rate : *Held*, that the decree of 1863 had not the effect of creating the relationship of landlord and tenant between the parties, and therefore the suit not having been brought within twelve years from the date of that decree, was barred by Art. 130 of the Limitation Act XV of 1877. BIR CHUNDER MANIKYA *v.* RAJMOHUN GOSWAMI ... 449

——————————— **Art. 130**—*Suit for assessment of rent on lakheraj land after decree for resumption—Effect of decree as creating or not relationship of landlord and tenant.*] The plaintiff in 1862 obtained a decree for resumption of land held under an invalid *lakheraj* title created before 1790, the decree declaring the land liable to assessment. In a suit brought more than twelve years after the decree against the representatives of the defendant in the suit of 1862 to assess the land : *Held*, that the decree of 1862 did not create the relationship of landlord and tenant between the parties, and that the suit was, therefore, barred under Art. 130 of the Limitation Act XV of 1877. NIL KOMUL CHUCKERBUTTY *v.* BIR CHUNDER MANIKYA ... ... 450 *note.*

——————————— **Art. 135**—*Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of* 1806—*Transfer of Property Act* (*IV of* 1882).] A mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by Art. 135 of sched. ii of Act XV of 1877. This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect on or before 31st March 1873 as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the

Limitation Act, 1877, Art. 135—*Contd.*
determination of the mortgagor's right of possession. In a suit brought in 1882 against these purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879: *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under Art. 135, as against them. The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed. SEINATH DAS *v.* KHETTER MOHUN SINGH 693

——— **Art. 142**—*Burden of proof—Date of dispossession or discontinuance of possession.*] The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 142 of sched. ii of Act XV of 1877) next preceding the suit. That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession. MOHIMA CHUNDER MOZOOMDAR *v.* MOHESH CHUNDER NEOGHI 473

——— **Art. 142**—*Symbolical possession.*] On the 7th November 1868, certain property was purchased by one Gopal Doss Banerjee at a sale held in execution of a decree obtained against one Jogodanund Gossami. On the 8th January 1873, the purchaser obtained a sale certificate, and, on the 10th August 1873, was put into symbolical possession of the property through the Court. On the 3rd March 1875 the plaintiff, in execution of a decree obtained against Gopal Doss Banerjee, purchased this property, symbolical possession of the property being given to him by the Court on the 31st March 1875. On the 7th August 1885, the plaintiff brought this suit to recover possession of this property,

Limitation Act, 1877, Art. 142—*Contd.*
alleging that he had been dispossessed therefrom on the 13th July 1885 by the defendant No. 2, who had taken an izara of the property from the son of Jogodanund. The defence set up was limitation: *Held*, that on the principle laid down in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack*, I. L. R., 5 Calc., 584, the suit was not barred. *Krishna Lall Dutt* v. *Radha Krishna Surkhel*, I. L. R., 10 Calc., 402, overruled. JOGOBUNDHU MITTER *v.* PURNANUND GOSSAMI 530

——— **Art. 179**—*Application for execution by benamidar—Application not in accordance with law.*] In a suit brought for a declaration of the plaintiff's right to hold certain property free of a mortgage decree, which had been purchased by one *G* on 13th August 1878, in execution of which decree several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice under s. 232 of the Civil Procedure Code, *G's* name was substituted as decree-holder, and execution taken out against the mortgaged property, *G* was found to be only a benamidar so far as his purchase of the mortgage decree was concerned: *Held*, that *G* being merely a benamidar, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code were not applications made in accordance with law within the terms of Art. 179 of the Limitation Act, 1877, so as to prevent the operation of the Law of Limitation. Execution of the mortgage decree was therefore barred. *Abdul Kureem* v. *Chukhun*, 5 C. L. R., 253, *Denonath Chuckerbutty* v. *Lalit Coomar Gangopadya*, I. L. R., 9 Calc., 633, 12 C. L. R., 145, and Mis. Ap. 453 of 1885, unreported, followed. *Purna Chundra Roy*, v. *Abhoya Chundra Roy*, 4 B. L. R., Ap. 40, and *Nadir Hossein* v. *Pearoo Thovildarinee*, 14 B. L. R., 425, dissented from. GOUR SUNDAR LAHIRI *v.* HEM CHUNDER CHOUDHRY. GOUR SUNDAR LAHIRI *v.* HAFIZ MAHOMED ALI KHAN ... 35

——— **Art. 179**—*Application to take a step in aid of execution—Opposing application to set aside sale in execution of decree.*] The appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of Art. 179 of sched. ii of the Limitation Act to take a step in aid of execution. The application contemplated by that article is an application to obtain some order of the Court in furtherance of the execution of the decree. UMESH CHUNDER DUTTA *v.* SOONDER NARAIN DEO 747

Limitation Act, 1877, Art. 179, cl. 2—*Appeal against whole decree by one defendant only—Execution of decree—Execution against judgment-debtor who did not appeal.*] A plaintiff obtained, on the 14th September 1881, a decree against two defendants, the decree as against the first defendant being one for partition; and, as against the second defendant (who had set up a julkar right on the lands claimed to be partitioned, and had contended that partition could not be had, and had obtained a partial decree, but had been ordered to pay partial costs to the plaintiff), being one for costs. The first defendant alone appealed against this decree, but unsuccessfully, his appeal being dismissed on the 18th January 1884. The decree-holder applied for execution of his decree as against the second defandant for costs in December 1886: *Held*, that the application was not barred, for that limitation ran from the 18th January 1884. NUNDUN LALL *v.* RAI JOYKHISEN 598

——————— **Art. 179, cl. 2**—*Appeal presented*" —"*Where there has been an appeal*"—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 541—*Execution of decree.*] The words "*appeal presented*" in the Limitation Act, 1887, mean an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure. The words "*where there has been an appeal*," in Art. 179, cl. 2 of sched. ii of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court. In execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court. AKSHOY KUMAR NUNDI *v.* CHUNDER MOHUN CHATHATI 250

Limitation for Registration of Document. *See* REGISTRATION ACT, 1877, ss. 23, 24, 76, 77 189

"Local Area." *See* JURISDICTION OF CRIMINAL COURT 667

Magistrate, Power of. *See* SUMMARY TRIAL 715

——————**of District, Power of.** *See* RECOGNIZANCE TO KEEP PEACE ... 779

Mahomedan Law—*Guardian—Power of guardians—Sale by guardian of property to which ward's title was in dispute, for the benefit of the latter.*] By the Mahomedan law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the ward's shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover

Mahomedan Law—*Continued.*

having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was. Although the sale deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it was one beneficial to them. KALI DUTT JHA *v.* ABDUL ALI 627

Maintenance of Hindu Widow. *See* HINDU LAW, PARTITION 758

——————, **Order of Criminal Court as to.** *See* CRIMINAL PROCEDURE CODE, 1882, s. 488 781

Manager, Suit on behalf of Ward by. *See* COURT OF WARDS ACT, s. 55 ... 89

Map. *See* EVIDENCE 186

Material irregularity in conducting Sale. *See* SALE IN EXECUTION OF DECREE 33

Matters in issue decided in former suit. *See* RES JUDICATA ... 103

Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104), s. 267.—*Trial of British Seamen for offences committed on British ship on the High Seas—Procedure at such trial—Murder—Admiralty Courts—British Seamen on British ship—Letters Patent, High Court,* 1865, *cl.* 26—*Case certified by Advocate-General.*] A British seaman who stood charged with the murder of a fellow sailor on board a British ship on the high seas, was tried by a Judge of the High Court, under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the Captain and Second Officer of the ship, taken on commisson; this evidence was admitted in evidence, and the prisoner was convicted and sentenced. It was objected, that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect, as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England: *Held*, on a case certified by the Advocate-General under cl. 26 of the Letters Patent, that the prisoner had been properly tried according to the ordinary practice of the High Court, and that the evidence was admissible against him. QUEEN-EMPRESS *v.* BARTON 283

Mesne Profits. *See* EXECUTION OF DECREE 40

——————**of Specific Shares in Family.** *See* HINDU LAW, PARTITION 397

Minor. *See* EXECUTION OF DECREE ... 40

——, Application by Next Friend of, where no Guardian ad litem had been appointed. *See* PRACTICE 771

Misrepresentation. *See* BENAMI TRANSACTION 137, 148

Money Deposited. *See* LIMITATION ACT, 1877, ARTS. 59 AND 60 25

——Lent. *See* LIMITATION ACT, 1877, ARTS. 59 AND 60 25

Mortgage—*Priority of mortgage—Intention of preserving a prior security presumed—Mortgagee—Mortgagor.*] On the 29th November 1882, *H* mortgaged to the plaintiff his one-third share in a house and garden to secure Rs. 1,000 with interest at 12 per cent. On the 3rd January 1884, *H* mortgaged his one-third share in the same house to a third person to secure Rs. 1,000 with interest at 18 per cent. On the 14th May 1884, *H* and his two brothers mortgaged to the plaintiff the entirety of the said house and garden to secure Rs. 3,400 with interest at 18 per cent. This last mortgage recited the mortgage of 29th November 1882, and a further loan of Rs. 100 by the plaintiff to *H*, and contained the following clause:—"Now in order to liquidate the said debt and on account of our necessity, we three brothers do this day mortgage to you whatever right, title and interest we have in the said two premises and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we are paying at the rate of Rs. 1-8 per month:" *Held*, that the transaction of the 14th May 1884 did not amount to payment of the original debt, but was in reality a further advance and a fresh security for both the old debt and the fresh advance, on different terms as to interest, the old debt remaining untouched; but that even had the original debt been satisfied thereby, that fact would not have necessarily destroyed the security, the presumption being, unless an intention to the contrary were shown, that the plaintiff intended to keep the security alive for his own benefit. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*, I. L. R., 10 Calc., 1035, followed in principle. GOPAL CHUNDER SEEEMANY *v.* HEREMBO CHUNDER HOLDAR 523

—— Bond, Construction of. *See* DECREE 540

Mortgagee, Position of, towards Mortgagor, when purchasing Mortgaged Property. *See* SALE IN EXECUTION OF DECREE 132

——Suit by, against Mortgagor and Purchasers from him. *See* LIMITATION ACT, 1877, ART. 135 ... 693

——with leave to bid, Purchase by *See* MORTGAGOR AND MORTGAGEE 682

Mortgagor and Mortgagee. *See* SALE IN EXECUTION OF DECREE 132

——Purchase of mortgaged property by mortgagee at judicial sale on leave obtained to bid.] Where mortgagees executed their decree on the mortgage, and having obtained leave to bid at the judicial sale, purchased the property: *Held*, that they could not be held to have purchased as trustees for the mortgagors, the leave granted to bid, having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchasers. MAHABIR PERSHAD SINGH *v.* MACNAGHTEN ... 682

—— Accounts between. *See* RES JUDICATA ... 682

Murder on British Ship on High Seas. *See* MERCHANT SHIPPING ACT, 1854, S. 267 238

Negotiable Instruments Act (XXVI of 1881), s. 35. *See* DECREE ... 804

Next Friend of Minor Defendant, Application by, where no Guardian ad litem has been appointed. *See* PRACTICE 771

Notice of possession of rent. *See* VENDOR AND PURCHASER 414

——Tenancy. *See* VENDOR AND PURCHASER 414

—— to Accused. *See* CRIMINAL PROCEDURE CODE, S. 195 661

Notification in Gazette. *See* APPEAL ... 426

Offence committed on British Ship on High Seas. *See* MERCHANT SHIPPING ACT, 1854, S. 267 238

Omission to bring forward defence. *See* RES JUDICATA 682

Onus of Proof. *See* LANDLORD AND TENANT 223

—— ——. *See* LIMITATION ACT, 1877, ART. 142 473

Open cover. *See* INSURANCE 564

Opposing Application to set aside sale. *See* LIMITATION ACT, 1877, ART. 179 747

Order directing Payment of Money at a certain date. *See* CIVIL PROCEDURE CODE, 1882, S. 230 16

——granting leave to appeal to Privy Council. *See* REVIEW 292 *note*

——of Affiliation. *See* CRIMINAL PROCEDURE CODE, 1882, S. 488 ... 781

——setting aside ex parte Decree. *See* APPEAL 42

——to abstain from certain act. *See* CRIMINAL PROCEDURE CODE, 1889, S. 144 80

Order to abstain from certain act. *See* SUPERINTENDENCE OF HIGH COURT ... 80

——under s. 312, Civil Procedure Code, 1882. *See* APPEAL 429

Oudh Estates' Act (I of 1869), s. 13. *See* REGISTRATION 468

——sub-section 1—*Meaning of "intestate" as there used—Written but unregistered authority to adopt—Registration Act (III of 1877), s. 17.*] The Oudh Estates' Act, 1869, requires the registration of the writing by which an authority to adopt is exercised; but not the registration of the authority, which is required by the Act to be in writing. The Indian Registration Act III of 1877, which does require authorities to adopt to be registered, expressly excepts authorities conferred by will. The word "intestate," in s. 13, sub-section 1, of the Oudh Estates' Act, 1869, means intestate as to the talukhdari estate; and the use of the word does not exclude from the exception in that sub-section a son adopted under an authority conferred by a talukhdar's unregistered will. A talukhdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riasat*. This power having been exercised, the following objections to the adoption were disallowed: 1*st*, one founded on the will not having been registered, and, consequently, the authority not having been registered; 2*ndly*, one founded on the erroneous argument that the adopted son was not within the class excepted in s. 13, sub-section 1, and therefore could not take under an unregistered will. BHAIYA RABIDAT SINGH *v.* INDAR KUNWAR 556

——, Rules for Registration in. *See* REGISTRATION 468

Parties—*Right of suit—Benamidar—Suit for declaration of title to, and for possession of, immoveable property—Disclaimer of real owner.*] In a suit for a declaration of the plaintiff's right by purchase to, and for possession of, certain immoveable property, it was found on the evidence that the plaintiff was merely a *benamidar* for one of the defendants, and had no right to the property. That defendant in his evidence disclaimed any title to the property: *Held*, that the plaintiff had no right to sue, being a mere *benamidar*, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, was sufficient to enable the plaintiff to maintain the suit when instituted, or to entitle him to have the real owner added as a co-plaintiff. *Prosunno Coomar Roy Chowdhry* v. *Gooro Churn Sein*, 3 W. R., 159, followed. HARI GOBIND ADHIKARI *v.* AKHOY KUMAR MOZUMDAR 364

——Substitution of, on Reviver. *See* PRIVY COUNCIL, PRACTICE OF ... 184

Partition. *See* HINDU LAW, PARTITION 758

Partition—*Jurisdiction of Civil Court—Partition by Civil Court of a portion of a revenue-paying estate—Civil Procedure Code (Act XIV of 1882), s. 265—Revenue-paying estate, partition of, into several revenue-paying estates.*] The meaning of s. 265 of the Code of Civil Procedure, is that where a revenue-paying estate has to be partitioned into several revenue-paying estates such partition must be carried out by the Collector. *Zahrun* v. *Gowri Sunkar*, I. L. R., 15 Calc., 198, approved. DEBI SINGH *v.* SHEO LALL SINGH 203

——*Suit to stay partition by Collector—Bengal Act VIII of 1876, ss. 26, 105—Specific Relief Act (I of 1877), s. 42—Declaration of specific rights—Limitation.*] A person bringing a suit under s. 42 of the Specific Relief Act to stay partition directed by the Collector under Bengal Act VIII of 1876, on the ground that a private partition has already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of, in severalty some specific portion of the property again sought to be partitioned by the Collector; and such person is entitled to no declaration affecting the rights of other shares in the parent estate. *Khoobun* v. *Wooma Churn Singh*, 3 C. L. R., 453, distinguished. *Semble*:—Section 26 of Bengal Act VIII of 1876 does not bar the right to bring an action, but merely limits the effect of the decree unless the action is brought within a certain time. KALUP NATH SINGH *v.* LALA RAMDEIN LAL 117

——, Suit for, of property partly in Calcutta and partly in Mofussil. *See* TRANSFER OF SUIT ... 771

Penal Code, s. 71. *See* SENTENCE ... 442

——, s. 97. *See* RIOTING ... 206

——, ss. 103, 104, 105. *See* RIOTING 206

——, ss. 141, 147. *See* RIOTING 206

——, ss. 144, 147, 148. *See* SENTENCE 442

——, s. 147. *See* SENTENCE ... 725

——, s. 183. *See* CRIMINAL PROCEDURE CODE, 1882, ss. 134, 144 ... 9

——, ss. 191, 193. *See* FALSE EVIDENCE 349

——; s. 196. *See* SESSIONS JUDGE, JURISDICTION OF 766

——, s. 210. *See* CRIMINAL PROCEDURE CODE, 1882, s. 437 ... 121

——, s. 210. *Civil Procedure Code (Act XIV of 1882), s. 258—Satisfaction of decree—Execution of decree—Fraudulently executing decree after it has been satisfied when satisfaction has not been certified to Court.*] A decree-holder having proceeded to execute his decree against his judgment-debtor, the latter objected, stat-

Penal Code, s. 210—*Continued.*
ing that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by s. 258 of the Code of Civil Procedure. The judgment-debtor, being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under s. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognised by the Court executing the decree, and that consequently no offence had been committed: *Held*, that the words "after it has been satisfied," used in s. 210 of the Penal Code, indicate only the *fact* of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognise it, does not prevent the decree-holder from being properly convicted of an offence under that section. MADHUB CHUNDER MOZUMDAR *v.* NOVODEEP CHUNDER PUNDIT 126

——————, **ss. 323, 325.** *See* SENTENCE 725

——————, **ss. 441 and 446**—*House-breaking by night—Criminal Trespass—Intent.*] When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and, when an attempt is made to capture him, uses great violence in his efforts to make good his escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441 of the Penal Code. An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence and effected his escape. Upon these facts he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal: *Held*, that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld. IN THE MATTER OF THE PETITION OF KOILASH CHUNDRA CHAKRABARTY. KOILASH CHANDRA CHAKRABARTY *v.* THE QUEEN-EMPRESS. ... 657

Penal Code, s. 447. *See* CRIMINAL TRESPASS 715

Permanent Tenure, Transfer of. *See* BENGAL TENANCY ACT, S. 12 ... 642

Police Diaries. *See* CRIMINAL PROCEDURE CODE, 1882, ss. 161, 172, 211... 610, 612 *note*

—— **Officer, Statement made to.** *See* FALSE EVIDENCE 349

Policy, Acceptance of. *See* INSURANCE ... 554

——, **Refusal to issue.** *See* INSURANCE 564

Possession, Discontinuance of. *See* LIMITATION ACT, 1877, ART. 142 ... 473

——————, **Inquiry into.** *See* CRIMINAL PROCEDURE CODE, 1882, S. 145 ... 281

——————, **Suit by occupancy ryot for, after dispossession by Landlord.** *See* LIMITATION 741

Possessory Suits. *See* LIMITATION ... 741

Power-of-attorney. *See* PRACTICE ... 776

Practice. *See* PRIVY COUNCIL, PRACTICE OF 184

——————. *See* REVIEW OF JUDGMENT ... 788

——————. *See* SECOND APPEAL ... 645

—————— *Power-of-attorney—Evidence Act (Act I of* 1872), *s.* 85—*Letter of administration, Application for.*] On an application for letters of administration to the estate of a deceased, who was domiciled in Scotland, and to whose estate one *P* had been appointed executor *dative qua Father*, the application being made by one *K*, under a power-of-attorney granted by *P*, such power not having been executed and authenticated in the manner provided by s. 85 of the Evidence Act: *Held*, that the application must be refused. IN THE GOODS OF PRIMROSE 776

—————— *Minor defendant, Application by next friend of, for transfer of case, where no guardian* ad litem *has been appointed—Civil Procedure Code (Act XIV of* 1882), *ss.* 410, 441, 443, 449.] A suit was instituted in a Mofussil Court against two defendants, one of them being a minor. Before a guardian *ad litem* had been appointed for the minor defendant, an application was made to the High Court to transfer the case from the Mofussil Court to the High Court in its Ordinary Original Civil jurisdiction by the minor defendant through a next friend. It was contended that the application was informal, and could not be granted, and that no such application could be made on behalf of the infant defendant until a guardian *ad litem* had been appointed, and then it should be made by him: *Held*, that the objection should not prevail, and that the application could be made through the next friend. JOTENDRONAUTH MITTER *v.* RAJ KRISTO MITTER 77

Presidency Magistrate, Appeal from Sentence of. *See* APPEAL IN CRIMINAL CASE 799

Primogeniture, Effect on existing rights of inheritance of Sanad recognizing. *See* HINDU LAW, PARTITION 397

Private Defence, Right of. *See* RIOTING 206

——— Purchase. *See* CIVIL PROCEDURE CODE, s. 244 355

Privy Council, Practice of—*Admission to practice in the Privy Council—Rules of 31st March 1871—Vakil of High Court.*] The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practise in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee. IN THE MATTER OF THE PETITION OF B. E. TWIDALE 636

——— *Practice relating to substitution of parties on revivor—Representative character to be ascertained by lower Court.*] On the death of a party on the record of an appeal pending before Her Majesty in Council proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of the Court below; which, also, should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below. HAIDAR ALI *v.* TASSADDUK RASUL. EX PARTE HAIDAR ALI... 184

Probate and Administration Act (V of 1881), s. 131. *See* SUCCESSION ACT, s. 96 549

Procedure, Right of. *See* EXECUTION OF DECREE 347

——— in Criminal Case. *See* MERCHANT SHIPPING ACT, 1854, s. 267 ... 238

Proceedings instituted prior to change in Procedure. *See* APPEAL... 429

Process, Issue of. *See* CIVIL PROCEDURE CODE, 1882, s. 230 744

Proclamation of Sale. *See* SALE IN EXECUTION OF DECREE 794

Property other than that mortgaged. Liability of. *See* DECREE ... 540

——— partly in Calcutta and partly in Mofussil, Suit for Partition of. *See* TRANSFER OF SUIT ... 771

Proposal to issue Policy. *See* INSURANCE 564

Proprietary Interest, Purchase by Tenant of share in. *See* RIGHT OF OCCUPANCY 127

Public Document. *See* EVIDENCE ACT (I OF 1872), s. 74 586

——— Policy. *See* EXCISE ACT (BENGAL ACT VII OF 1878) 436

——— Servant, Disobeying Order of. *See* CRIMINAL PROCEDURE CODE, 1882, ss. 134, 184 9

Purchase by Mortgagee with leave to bid. *See* RES JUDICATA... ... 682

——— Tenant of Fractional Share of Proprietary Interest *See* RIGHT OF OCCUPANCY 127

———pendente lite. *See* CIVIL PROCEDURE CODE, s. 244 355

——— money, Failure to make deposit of. *See* SALE IN EXECUTION OF DECREE 33

Purchaser at Execution Sale. *See* CIVIL PROCEDURE CODE, s. 244 ... 355

———, Suit by, for possession when Vendor is out of possession. *See* TRANSFER OF PROPERTY ACT, s. 54 622

Purda-nashin Lady. *See* WILL ... 19

———, Effect of conveyance executed on behalf of. *See* REGISTRAR OF HIGH COURT, AUTHORITY OF 330

Question for Court Executing Decree. *See* CIVIL PROCEDURE CODE, 1882, s. 293 535

——— of Law. *See* APPEAL TO PRIVY COUNCIL ... ... 287, 292 *note*

———Title. *See* LIMITATION ... 741

——— to be decided in execution. *See* CIVIL PROCEDURE CODE, 1882, s. 244... 603

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Readiness and Willingness. *See* CONTRACT, CONSTRUCTION OF 417

Receipts for Rent by one of several co-sharers. *See* BENGAL TENANCY ACT, s. 88 155

Recognizance to Keep Peace—*Security for keeping the peace—Magistrate of the District—Appellate Court—Criminal Procedure Code (Act X of 1882), ss. 106, 423.*] The Magistrate of a District, when acting as an Appellate Court, is not competent to make an order under s. 106 of the Criminal Procedure Code (Act X of 1882), requiring the appellant to furnish security for keeping the peace. IN THE MATTER OF THE PETITION OF ASLU. ASLU *v.* THE QUEEN-EMPRESS 779

Record of Right. *See* APPEAL ... 596

Redemption, Right of—*Foreclosure decree—Order absolute—Reemption of mortgage before order absolute—Transfer of Property Act (IV of 1882), s. 87.*] In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, 1882. POREE NATH MOJUMDAR *v.* RAMJODU MOJUMDAR 246

———————*Redemption claimed under terms of mortgage—Insufficient tender of mortgage money—Transfer of Property Act (IV of 1882), ss. 60, 83 and 84.*] According to the judgment of the Appellate Court below, a mortgagor, having liberty by the terms of his mortgage to redeem at the end of its second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year the principal money had been deposited in Court, and that for the interest, for both years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage, on appeal was dismissed. HEWANCHAL SINGH *v.* JAWAHIR SINGH 307

Refusal of Arbitrator to act. *See* ARBITRATION 806

——— **to attend for Registration of Document.** *See* REGISTRATION ACT, 1877, ss. 23, 24, 76, 77 189

Registrar of High Court, Authority of—*Power to execute conveyance and enter into covenants on behalf of infants and persons refusing to execute—Defects of title known to purchaser at time of sale—Covenants for title and quiet enjoyment—Parda-nashin when not bound by conveyance executed by her containing covenants for title and quiet enjoyment—Civil Procedure Code (Act XIV of 1882), ss. 261, 262—Rules of Court (Belchambers' Rules and Orders), Nos. 341 and 436.*] The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any covenants on his behalf. The power of the Registrar to execute such a conveyance rests upon statutory authority. General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of the sale, unless the intention of the parties that they should not do so is clearly expressed in the covenants themselves. "Conveyance," as used in Rule 436 (Belchambers' Rules and Orders) means such an instrument as may be necessary to transfer the estate, if he has any, belonging to the person on behalf of whom the Registrar executes the transfer to the purchaser. Circumstances under which a *parda-nashin* lady will be relieved from liability under covenants contained in a conveyance executed by her. *D*, an heir of one *X*, a deceased Hindu lady, sold and conveyed to *M*, in March 1878, a moiety in certain premises belonging to the estate of *X*. Subsequently a decree was made for partition of the estate left by *X* in a suit to which *D*, *A*, *R*, *G* and *S* were parties, and an order was made in that suit directing the premises, of which *D* had so sold a moiety, to be sold by the Registrar, and the parties were directed to join in the conveyance, the Registrar being directed to approve and execute the same on behalf of *G* who was an infant. At the sale, the plaintiff purchased the premises, and thereafter *D* refused to execute the conveyance, which included the usual covenants for title and quiet enjoyment. A summons was thereupon taken out against him, and an order was made directing the Registrar to execute the conveyance on his behalf. The conveyance was then executed in September 1885 by *A*, *S* and *R*, and by the Registrar on behalf of *D* and the minor *G*. In a suit instituted by *M*, under the conveyance of 1878, the Court held that he was entitled to possession, as against the plaintiffs, of the moiety of the premises covered by his conveyance. The plaintiff, therefore, brought a suit against *D*, *A*, *R*, *G* and *S* to recover damages for breach of the covenants for title and quiet enjoyment. It was not found that *R* had any good independent advice in the matter, or that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself: *Held*, that although the Registrar had authority to execute the conveyance on behalf of *D* and *G*, he had no authority to enter into the covenants on their behalf, and that the suit should be dismissed as against them: *Held*, also, that having regard to the position of *R*, the suit should also be dismissed as against her. RAM CHUNDER DUTT *v.* DWARKA NATH BYSACK ... 330

Registration—*Registration in accordance with the rules of 1862, regulating the place and mode of it, in Oudh—Oudh Estates' Act (I of 1869), s. 13.*] An Oudh talukhdarni made a grant of a village, part of her talukhdari, to her adopted daughter; the instrument requiring, in order to be valid under Act I of 1869, s. 13, to be registered within one month after execution. With a view to its registration, she, being a *purda-nashin*, sent for the neighbouring Pargana Registrar, who attended at her house for her convenience, took her acknowledgment of the document, recorded the registration, and filed a copy of the document in his office: *Held*, that this proceeding was a registration of the document, complete and effective; having been, substantially, a registration at the Pargana office. MAJID HOSSEIN *v.* FAZL-UL-NISSA 468

Registration Act (III of 1877), s. 17. *See* OUDH ESTATES' ACT (I OF 1869), s. 13 556

——————————, **ss. 23, 24, 76, 77**—*Limitation for registration or order of refusal of a document admitted for registration by Registrar—Denial of execution—Refusal to attend—Limitation for suit under s. 77 of the Registration Act.*] No period is prescribed by Act III of 1877, within which a document which has been admitted for registration, may be registered, or within which the order of refusal by the Registrar to register the document must be made. There is nothing in ss. 76 and 77 to compel the Registrar in cases where there has been no express denial of execution, but where the executant refuses to attend at his office, to make his order of refusal within the time limited for admission of execution by ss. 23 and 24. Limitation in respect of a suit under s. 77 begins to run from the date of such order. *Mukhun Lall Panday* v. *Koondun Lall*, 15 B. L. R., 228, S. C., L. R., 2, I. A., 231, 24 W. R., 75, and *Shama Charan Das* v. *Joyenoolah*, I. L. R., 11 Calc., 750, relied on. *In the matter of Buttobehary Banerjee*, 11 B. L. R., 20, dissented from. LUCKHI NARAIN KHETTRY *v.* SATCOWRIE PYNE 189

——————————, **s. 77**—*Suit to compel registration of document not compulsorily registrable.*] Under the Registration Act of 1877, a suit lies by a purchaser to compel registration of his kobala in a case in which the value of the property conveyed is under Rs. 100, and in which, therefore, the registration of the deed is not compulsory. TOPA BIBI *v.* ASHANULLAH SARDAR 509

——————**of Tenure.** *See* BENGAL TENANCY ACT, s. 12 642

Regulation—1803—XVII. *See* LIMITATION ACT, 1877, ART. 135 693

——————**1822—VII.** *See* ENHANCEMENT OF RENT 586

Remission to Arbitrator. *See* ARBITRATION 806

Rent, Arrears of, Decree for. *See* EXECUTION OF DECREE 511

——, **Dispute as to right to Collect.** *See* CRIMINAL PROCEDURE CODE, 1882, s. 145 513

——, **Evidence of Rate of.** *See* RES JUDICATA 300

——, **Suit for.** *See* APPEAL... ... 155

——————, **by Unregistered Proprietor.** *See* LAND REGISTRATION ACT, s. 78 706

Representative of Judgment-debtor. *See* CIVIL PROCEDURE CODE, s. 244 ... 355

Representative as Party to Suit. *See* CIVIL PROCEDURE CODE, 1882, s. 244 ... 1

Res Judicata—*Civil Procedure Code (Act XIV of 1882), s. 13.*] The decision of an issue in one of two suits tried together, which is not appealed against, cannot be treated as *res judicata* so far as the same issue is concerned in an appeal from the decision in the other suit. *A*, a *ticcadar*, sued *B* for rent in respect of a holding in the *ticca*. In that suit *B* pleaded that he was a partner of *A* in the *ticca* transaction, and that no rent was due from him in consequence thereof. *B* then sued *A* for an account of the partnership in the same transaction, and *A*, in that suit denied the partnership. Both suits were heard together by the Munsiff who held *B* was not a partner. *B* appealed against the judgment and decree in the account suit, but did not appeal against that in the rent suit. It was contended on the appeal that the question as to whether *B* was or was not a partner was *res judicata*, by reason of the decision in the rent suit not being appealed against and having become binding: *Held*, that s. 13 of the Code of Civil Procedure did not apply, and that the question was not *res judicata*. There was no bar at the time the issue was tried and decided by the Munsiff, and the Appellate Court was bound to decide the appeal upon the evidence. ABDUL MAJID *v.* JEW NARAIN MATHO 233

——————*Civil Procedure Code (Act XIV of 1882), s. 13—Estoppel by judgment—Act IX of 1847—Alluvion.*] To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this, as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided. This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted: *Held*, that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882, Civil Procedure Code. KALI KRISHNA TAGORE *v.* SECRETARY OF STATE FOR INDIA 173

——————*Civil Procedure Code, s. 13—Omission to bring forward in a prior suit what then would have been a defence—Account between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.*] A mortgage between parties who had

Res Judicata—*Continued.*

accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who, in 1878, obtained a decree upon the mortgage, although at the time they owed to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees' decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished, by having set off against it the rents which had already accrued, or might afterwads accrue, and for possession of the lands on the expiry of the lease: *Held*, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exceptione rei judicatæ*. Nor could the mortgagees be held to have purchased as trustees for the mortgagors, as suggested for the appellant, the leave granted to bid, having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser. MAHABIR PERSHAD SINGH *v.* MACNAGHTEN ... 682

———*Civil Procedure Code, s.* 13—*Substantial matter in issue decided in a former suit—Right of shebaitship of a family deb-sheba under a will.*] A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, 'offerings to the deity.'" One or other of the brothers then for some years managed the estate as shebaits, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the

Res Judicata—*Continued.*

testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait. In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it: *Held*, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will constituting, as construed by Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion. KAMINI DEBI *v.* ASUTOSH MUKERJI. ASUTOSH MUKERJI *v.* KAMINI DEBI 103

———*Civil Procedure Code (Act XIV of* 1882), *ss.* 13, 43—*Cause of action—Damages.*] —In September 1886 the plaintiff sued in a Munsiff's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. This suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision. In March 1887 the plaintiff sued these defendants in the Munsiff's Court for possession of 5 biggahs 6 cottahs of land and for mesne profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne profits; possession of the one biggah, the subject of the suit of 1886, being included in the 3 biggahs 6 cottahs decreed. He subsequently sued the same defendants in the Small Cause Court for damages for the paddy cut and carried on the 23rd December 1885: *Held*, that such suit was not barred by either s. 13 or s. 43 of the Civil Procedure Code. MAHABEER SING *v.* RAMBHAJJAN SHA ... 545

———*Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss.* 13, 102, 103.] The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favour of the defendant as *res judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause

Res Judicata—*Continued.*

of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favour. Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favour of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code: *Held*, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen. CHAND KOUN *v.* PARTAB SINGH ... 98

——— *Evidence—Estoppel—Ex parte decree, Effect of—Rate of rent—Rent suit—Civil Procedure Code (Act of XIV 1882), s. 13.*] A mere statement of an alleged rate of rent in a plaint in a rent suit in which an *ex parte* decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree. Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case. MODHUSUDUN SHAHA MUNDUL *v.* BRAB 300

Restraint on Alienation. *See* GRANT, CONSTRUCTION OF 71

Resumption. Effect of decree for, as creating or not relation of Landlord and Tenant. *See* LIMITATION ACT, 1877, ART. 130 ... 449, 450 *note.*

Revenue, Protection of. *See* EXCISE ACT (BENGAL ACT VII OF 1878) ... 436

Review—*Code of Civil Procedure (Act XIV of 1882), ss. 623, 627—Practice.*] A second appeal was decided on the 1st June 1888 in favour of the respondent by Mr. Justice Wilson and Mr. Justice Beverley. On 24th July 1888, an application for review was filed with the Registrar. Various reasons prevented the learned Judges above-named from sitting together until the month of March 1889. On the 6th March, the matter came up before their Lordships, when a rule was issued, calling upon the other

Review—*Continued.*

side to show cause why a review of judgment should not be granted, being made returnable on the 28th March 1889. On the 28th March, Mr. Justice Wilson had left India on furlough, and the rule was taken up, heard, and made absolute, by Mr. Justice Beverley, sitting alone: *Held*, that Mr. Justice Beverley had jurisdiction to hear the rule. ABHOY CHURN MOHUNT *v.* SHAMONT LOCHUN MOHUNT ... 788

——— *Orders subject to review—Order granting leave to appeal to Privy Council.*] PER PRINSEP, J.—An order granting leave to appeal to the Privy Council is open to review. GOPINATH BIRBAR *v.* GOLUCK CHUNDER BOSE 299 *note.*

———**Order Granting.** *See* APPEAL 788

Revision, Power of High Court on. *See* SANCTION TO PROSECUTION ... 730

Revisional Power, Exercise of, by High Court. *See* CRIMINAL PROCEDURE CODE, S. 195 661

Revivor Substitution of Parties on. *See* PRIVY COUNCIL, PRACTICE OF ... 184

Right of Occupancy—*Purchase by tenant of fractional share of proprietary interest, Effect of, on acquisition of right of occupancy—Bengal Act VIII of 1869, s. 6.*] A tenant, who had commenced to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietory interest, and continued to occupy the holding as ryot till the 13th May 1885, when he was dispossessed. On the 30th March 1886, he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that, owing to the purchase of the share of the proprietory interest he could not have acquired such right: *Held*, that under Bengal Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued to hold the land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding. GUR BUKSH ROY *alias* GUR BUKSH SINGH *v.* JEOLAL ROY 127

——— ——— *Suburban lands let for building purposes.*] There is no authority for the proposition "that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants." *Gungadhur Shikdar v. Azimuddin Shah Biswas*, I. L. R., 8 Calc., 960, explained. *Ramdhun Khan* v. *Haradhun Puramanick*, 12 W. R., 404, 9 B. L. R., 107 note, relied on. RAKHAL DAS ADDY *v.* DINOMOYI DEBI 652

Right of Suit. *See* PARTIES ... 364

——— *Suit for compensation for wrongful seizure of Cattle—Cattle Trespass Act (I of 1871).*] A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit. *Nomaz Mollah* v. *Lall Mohun Tagadgeer*, 15 W. R., 279, approved of, *Aslem* v. *Kalla Durzi*, 2 C. L. R., 344, dissented from. SHUTTRUGHON DAS COOMAR *v.* HOKNA SHOWTAL ... 159

——— **user**—*License to use land of another, coupled with grant—Revocation of License—Right of licensee to damages.*] A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages if revoked contrary to the terms of any express or implied contract. *Wood* v. *Leadbitter*, 13 M. and W., 838, applied. PROSONNA COOMAR SINGHA *v.* RAM COOMAR GHOSE ... 64

Rioting. *See* SENTENCE ... 442 725

——— *Unlawful Assembly—Right of private defence of property—Penal Code (Act XLV of 1860), ss. 97, 103, 104, 105, 141 and 147.*] A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M.* for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on the lands of their master *T.* The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M., they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T's* men some five of whom were more or less severely wounded with the *lathies*. The occurrence resulted in the conviction of some of *M's* servants for rioting under s. 147 of the Penal Code. *M's* people wholly denied any right on the part of *T* to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M's* people was not an "unlawful assembly;" that the interference by *T's* people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so: *Held*, that the prisoners had been rightly convicted: *Held*, further, that as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that as, upon the facts of the case as found, no offence had been commited by *T's* people, their acts amounting merely to a civil trespass, and that as there was no pressing or immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case. It was further contended that *M's* people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one: *Held*, that they were members of an assembly the common object of which was by show of criminal force and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. (4). *Queen* v. *Mitto Singh*, 3 W. R., Cr., 41. *Shunker Singh* v. *Burmah Mahto*, 23 W. R., Cr., 25, and *Birjoo Singh* v. *Kabu Lall*, 19 W. R., Cr., 66, referred to and commented on. GANOURI LALL DAS *v.* THE QUEEN-EMPRESS 206

Rules made under Bengal Tenancy Act. *See* APPEAL 596

——— **of High Court, Nos. 341 and 436.** *See* REGISTRAR OF HIGH COURT, AUTHORITY OF 330

——— **Privy Council of 31st March, 1871.** *See* PRIVY COUNCIL, PRACTICE OF 636

Sale by Auction—*Auctioneers—Agent bidding "kutcha-pucca"—Usage of trade—Custom—Condition of sale.*] An agent of the defendants made, at an auction sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure. Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent. In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated "that such an arrangement had never been repudiated:" *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and there-

Sale by Auction—*Continued.*

fore that no suit would lie. MACKENZIE LYLAL & Co. *v.* CHAMROO SINGH & Co. ... 702

—— **by Retail with Wholesale Licenso.** *See* EXCISE ACT, ss. 60, 74 799

—— **for Arrears of Revenue**—*Fraud—Bidders, Dissuasion of.*] In a suit by some of the co-sharers in a mouzah against the others to set aside a sale for arrears of revenue, the finding of the Court of first instance established that a certain co-sharer in a mouzah had intentionally withheld the payment of a small arrear of Government revenue, and had thereby caused the property to be sold under Act XI of 1859, purchasing it himself for a small sum in the name of certain other persons; and had also dissuaded certain intending bidders from bidding at such sale: *Held*, that the evidence did not warrant such a finding, but that assuming these facts to have been established, the right of the co-sharer to buy up the estate at the revenue sale was not based upon any right or interest common to himself and his co-sharers, and that, in the absence of misrepresentation or concealment, the fact that he had intentionally defaulted as found, did not constitute fraud; nor did the fact, that he had deterred others from bidding for the property, necessarily constitute an act of fraud. *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar*, I. L. R., 3 Calc., 300, distinguished. DOORGA SINGH *v.* SHEO PERSHAD SINGH 194

—— **in Execution of Decree.** *See* CIVIL PROCEDURE CODE, 1882, s. 293 ... 535

———————— *See* CO-SHARER 326

———————— *Civil Procedure Code*, 1882, s. 294—*Decree-holder, Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy—Practice.*] A mortgagee who has obtained a mortgage decree, and, after obtaining permission to bid at the sale held in execution of such decree, has become the purchaser, does not stand in a fiduciary position towards his mortgagor, *Hart* v. *Tara Prasanna Mukerji*, I. L. R., 11 Calc., 718, distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court. The permission to a mortgagee to bid should be very cautiously granted, and only when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale proclamation has been duly published. SHEONATH DOSS *v.* JANKI PROSAD SINGH... 132

———————— *Failure by purchaser to make the deposit required by s. 306 of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of 1882), ss. 244, 306, 308, 311 and 312.*] Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per cent. on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure, constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie. *Intizam Ali Khan* v. *Narain Singh*, I. L. R., 5 All., 316, dissented from. BHIM SINGH *v.* SARWAN SINGH 33

———————— *Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287—Sale set aside as being no sale.*] A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation: *Held*, that there had been no sale within the meaning of the Code; proclamation of the time and place of sale and the holding of the sale at such time and place, being conditions precedent to the sale being a sale under the Code. BASHARUTULLA *v.* UMA CHURN DUTT ... 794

—— **of other than Mortgaged Property, Decree for.** *See* TRANSFER OF PROPERTY ACT, ss. 88, 90 423

—— **of Property to which Title was disputed.** *See* MAHOMADAN LAW—GUARDIAN 627

Sanad recognizing Primogeniture. Effect of, on existing rights of Inheritance. *See* HINDU LAW, PARTITION 397

Sanction of Court to Agreement. *See* CIVIL PROCEDURE CODE, 1882, s 257A 504

———— **to Institute Suit.** *See* COURT OF WARDS ACT, s. 55 89

———— **to Prosecution.** *See* CRIMINAL PROCEDURE CODE, s, 195 661

————————. *See* CRIMINAL PROCEDURE CODE, 1882, s. 487 ... 121

————————. *See* SESSIONS JUDGE, JURISDICTION OF 766

———————— *Criminal Procedure Code (Act X of 1882), ss. 195, 439, 476—Jurisdiction of High Court in revision to quash orders under s. 476 of the Criminal Procedure Code.*] The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, whether made un-

Sanction to Prosecution.—*Continued.*

der s. 195 or under s. 476 of the Criminal Procedure Code, directing the prosecution of any person for offences referred to in those sections. The High Court, under s. 439, has the powers conferred on a Court of Appeal by s. 423 to alter or reverse any such order. Before a Court is justified in making an order under s 476, directing the prosecution of any person, it ought to have before it direct evidence, fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section, or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted. Where a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate, with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute. *Queen* v. *Baijoo Lal*, I. L. R., 1 Calc., 450, and *In the Matter of the Petition of Kali Prosunno Bagchee*, 23 W. R., Cr., 23, followed. IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR *v.* GRISH CHUNDER MUKERJI 730

Satisfaction of Decree. *See* PENAL CODE, s. 210 126

Scheduled Debts. *See* INSOLVENCY ... 85

Second Appeal—*Code of Civil Procedure* (*Act XIV of* 1882), *ss.* 584, 585—*Jurisdiction to hear a second appeal, on what matters—Secondary evidence, Question of.*] Under ss. 584 and 585 of the Code of Civil Procedure, 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure. On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the Original Court, the only questions were (1), whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2) whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document: *Held*, by the Judicial Committee of the Privy Council that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of fact of the first Appellate Court. LUCHMAN SINGH *v.* PUNA ... 753

Second Appeal—*Practice—Finding of facts—Interference with finding of facts on second appeal.*] As a general rule, the High Court will not interfere with the finding of facts by the lower Appellate Court on second appeal, save on some very special ground; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case, has not been satisfactorily arrived at. GOLUK NATH *alias* BAKHAL DAS CHUTTOPADHYA *v.* KIRTI CHUNDER HALDAR 645

Secondary Evidence, Admission of. *See* EVIDENCE 753

————————, Question of. *See* SECOND APPEAL 753

Security for Costs. *See* EXECUTION OF DECREE 323

————, Order to Furnish. *See* RECOGNIZANCE TO KEEP PEACE 779

———— Bond, Enforcement of, by Execution. *See* EXECUTION OF DECREE 323

Sentence—*Cumulative sentences—Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code* (*Act XLV of* 1860), *ss*, 147, 323, 325.] Six accused persons were charged with and convicted of rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the Penal Code: *Held*, that the sentences were legal. During the course of a riot, in which *X* was attacked and beaten by several of the rioters, one of them, *K*, inflicted grievous hurt on *X* by breaking his rib with a blow struck with a *lathi*; *K* and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code, and *K* was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on *K* and also on the other three for each of the offences: *Held*, that the sentences on *K* were legal, but that as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted *X*, the conviction of them under s. 325 read with s. 109 could not be supported. IN THE MATTER OF THE PETITION OF MOHUR MIR *v.* THE QUEEN-EMPRESS, AND IN THE MATTER OF THE PETITION OF KALI ROY *v.* THE QUEEN-EMPRESS 725

————————*Separate sentence for rioting and grievous hurt—Penal Code, ss.* 71, *para.* 1, 144,

Sentence—*Continued.*

147, 148, 321—*Act VIII of* 1882—*Criminal Procedure Code* (*Act X of* 1882), *s.* 35.] *Per Curiam* (TOTTENHAM, J., dissenting)- Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 141 of the Penal Code. *Empress* v. *Ram Partab*, I. L. R., 6 All., 121, approved; *Loke Nath Sirkar* v. *Queen-Empress*, I. L. R., 11 Calc., 349, overruled. NILMONEY PODDAR *v.* QUEEN-EMPRESS 442

————on Second Conviction of Offence under Excise Act *See* EXCISE ACT, ss. 60, 74 799

Separate Conviction for more than one offence. *See* SENTENCE ... 725

Sessions Judge, Jurisdiction of—*Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code* (*Act X of* 1882), *ss.* 195, 487—*Penal Code, s.* 196.] A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure. *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit*, I. L. R., 16 Calc., 121, overruled; *Empress* v. *D'Silva*, I. L. R., 6 Bom., 479, referred to. QUEEN-EMPRESS *v* SARAT CHUNDRA RAKHIT 766

Set-off—*Civil Procedure Code* (*Act XIV of* 1882) *ss.* 233, 243, 246—*Execution of assigned decree—Set-off against decree partly executed.*] *AB* had obtained a decree against *K* and *T*. After the decree had been partially satisfied, *AB* assigned it to *D*. Prior to the date of the assignment, *K* and *T* had instituted a suit against *AB* and *D* and ultimately obtained a decree against both of them: *Held*, that *K* and *T* were entitled to set off their decree against the unexecuted portion of the decree which had been assigned to *D*. KRISTO RAMANI DASSEE *v.* KEDAR NATH CHAKRAVARTI ... 619

————*Cross-demand arising out of the same transaction—Civil Procedure Code* (*Act XIV of* 1882), *s.* 111.] When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under s. 111 of the Civil Procedure Code. *Bhagbat Panda* v. *Bamdeb Panda*, I. L. R., 11 Calc., 557, relied on; *Clark* v. *Ruthnavaloo Chetti*, 2 Mad. H. C., 296, referred to. CHISHOLM *v.* GOPAL CHUNDER SURMA 711

Settlement of Government Khas Mehal. *See* ENHANCEMENT OF RENT 586

————of Rents, Order of Special Judge as to. *See* APPEAL ... 596

Shebaitship, Right of, under will. *See* RES JUDICATA 103

Special Judge, Order of, as to Settlement of Rents. *See* APPEAL ... 596

Specific Relief Act, I of 1887, s. 42. *See* PARTITION 117

Stamp Act, 1860, s. 67. *See* STAMP ACT, 1879, SCH. I, ARTS. 11, 19 ... 432

————, 1879, Sch. I, Arts. 11, 19—*Cheque—Bill of Exchange—Admissibility in evidence—Post-dated Cheque—Stamp Act*, 1879, *s.* 67—*Penalty.*] In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at. *Bull* v. *O'Sullivan*, L. R., 62 B., 209, *Gatty* v. *Fry*, L. R., 2 Ex. D., 265, and *Chandra Kant Mookerjee* v. *Kartik Charan Chaile*, 5 B. L. R., 103, referred to. Where a cheque bearing a stamp of one anna was dated the 25th September, and the evidence showed it to have been actually drawn on the 8th September, and therefore to have been post-dated, it was contended that the cheque was really a bill of exchange, payable 17 days after date, and therefore inadmissible in evidence as being insufficiently stamped: *Held*, in a suit to recover the amount of the cheque on its being dishonoured, that it was admissible in evidence. RAMEN CHETTY *v.* MAHOMED GHOUSE 432

Statement made to Police Officer. *See* FALSE EVIDENCE 349

Statements of witnesses recorded by Police Officers, Right of Accused to call for and inspect. *See* CRIMINAL PROCEDURE CODE, 1882, ss. 161, 172, 211 610, 612 *note.*

Statute, 17 & 18 Vict., c. 104. *See* MERCHANT SHIPPING ACT, 1854 ... 283

———— 24 and 25 Vict., c. 104, s 15. *See* SUPERINTENDENCE OF HIGH COURT 80

Substantial Question of Law. *See* APPEAL TO PRIVY COUNCIL 287, 292 *note.*

Succession Act (X of 1865), s. 50. *See* WILL 19

———————— s. 96—*Hindu Will's Act* (*XXI of* 1870), *ss.* 2, 3—*Lapsed legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act* (*V of* 1881), *s.* 131.]—A testator, by his will dated the 22nd April 1878, gave a legacy of Rs. 5,000 to his

Succession (Act X of 1865).—*Continued.*

son's daughter Jodha, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia. The testator died on the 2nd February 1881, and Jodha in October 1879; the money due by the Rajah of Bettia was realized on the 7th December 1884. Jodha left an only child Binda, who was born before the death of the testator. Binda sued to recover the legacy left to her mother; the defence was that the legacy had lapsed: *Held*, that Jodha was, in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator because a lineal descendant of her's survived the testator. JITU LAL MAHATA *v.* BINDA BIBI 549

Successive Interests, Bequest of. *See* HINDU LAW, WILL 383

Summary Trial—*Magistrate, Power of, to try case summarily—Criminal Procedure Code (Act X of 1882), s. 260.*] A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148 and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily and convicted one of the accused. It was contended that he had no power so to try and dispose of the case: *Held*, that the Magistrate had power to try the case summarily. When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences. GOLAP PANDEY *v.* BODDAM 745

Superintendence of High Court. *See* APPEAL 596

———— *Arbitration—Award—Application to file award, Objection to—Decree on award, Finality of—Private arbitration—Revisional powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 520, 521, 525, 526 and 622.*] Certain disputes between parties were referred under a written agreement to an arbitrator, who, in due course, made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The

Superintendence of High Court—*Contd.*

defendants came in and objected to the award on the following amongst other grounds:—(1) That the value of the property in suit was Rs. 500 only, and therefore that the application should have been made in the Munsiff's Court and not in that of the Subordinate Judge. (2) That the agreement of submission was vague and indefinite and did not clearly set out the matters in dispute. The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed thereon. The plaintiff appealed. The defendants contended that no appeal lay, and that, if it did, it lay to the District Judge and not to the High Court: *Held*, that, assuming that on a proceeding under ss. 525 and 526, the Court has power to consider such objections as are mentioned in ss. 520 and 521, the above objections did not fall under either section, but that the Subordinate Judge, before entertaining the application, was bound to satisfy himself that he had jurisdiction to entertain it, and for that purpose to take evidence regarding the value of the property; and that even if no appeal lay, the High Court could interfere under its revisional powers, because the Subordinate Judge had acted in the exercise of his jurisdiction illegally in assuming jurisdiction without taking such evidence: *Held*, further, that as the second objection was well founded inasmuch as the agreement to refer was vague and indefinite, and did not clearly lay down the power of the arbitrator in dealing with the subject-matter in dispute, and as it was not possible to make out what powers were intended to be conferred upon the arbitrator, the award should not be allowed to be enforced under the provisions of ss. 525 and 526. BINDESSURI PERSHAD SING *v.* JANKEE PERSHAD SINGH 482

———— *Code of Civil Procedure (Act XIV of 1882), s. 622.*] A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code. MUHAMMAD YUSUF KHAN *v.* ABDUL RAHAMAN KHAN 749

———— *Criminal Procedure Code (Act X of 1882), s. 144—Charter Act, 24 & 25 Vic., c. 104, s. 15—Order to abstain from certain act*] A Deputy Commissioner passed an order under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants, from the ryots of two specified pergunnahs; and also from effecting any sale or putting in hand any transaction with

Superintendence of High Court—*Contd.* regard to standing trees or collected timbers on an estate, or erecting any *adda* or *kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order: *Held*, that the High Court had jurisdiction, under s. 15 of the Charter Act, to set it aside if it were made without jurisdiction. ABAYESWARI DEBI *v.* SIDHESWARI DEBI 80

Survivorship. *See* HINDU LAW, INHERITANCE 367

Symbolical Possession. *See* LIMITATION ACT, 1877, ART. 142... ... 530

Talukhdari Estate in Oudh. *See* HINDU LAW, PARTITION 397

Tangible Immoveable Property. *See* CRIMINAL PROCEDURE CODE, 1882, S. 145... 513

Tenancy, Presumption of nature of, from long continuance. *See* LANDLORD AND TENANT 223

Tender of Mortgage Money. *See* REDEMPTION, RIGHT OF 307

Title, Question of. *See* EVIDENCE ... 186

———. *See* LIMITATION ... 741

Trader at Hat. *See* CRIMINAL PROCEDURE CODE, 1882, ss. 134, 144 ... 9

Transfer by Operation of Law. *See* EXECUTION OF DECREE 347

——— of Property Act (IV of 1882). *See* LIMITATION ACT, 1877, ART. 135 693

——— (IV of 1882), s. 54—*Transfer of immoveable property by unregistered deed—Deed of which registration is optional—Suit by purchaser for possession when vendor is out of possession.*] Section 54 of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated so as to confer a valid title. Where the plaintiff bought from the heirs of *M*, who were out of possession, their right, title and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of the value of less than Rs. 100) not being compulsory: *Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on the plaintiff, though not made by registered deed or by delivery of the property. The *dictum* of Garth. C.J., in *Narain Chunder Chuckerbutty* v. *Dataram Roy*, I. L. R., 8 Calc., 597, at p. 612, dissented from. KHATU BIBI *v.* MADHORAM BARSICK 622

Transfer of Property Act (IV of 1882), ss. 60, 83, 84. *See* REDEMPTION, RIGHT OF 702

——— (IV of 1882), s. 87. *See* REDEMPTION, RIGHT OF 246

——— (IV of 1882), ss. 88, 90—*Decree unsatisfied by sale of mortgaged property—Right to decree for sale of other than mortgaged property.*] The holder of a decree on a mortgage obtained an order under s. 88 of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this when sold being insufficient to satisfy the decree, he applied for a decree under s. 90 for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under s. 88: *Held*, that the decree-holder was entitled to the decree asked for. The terms of s. 90 contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under s. 90 for realization of the balance from other properties of the debtor. SONATUN SHAW *v.* ALI NEWAZ KHAN ... 423

——— ——— Suit—*Suit for partition of property partly in Calcutta and partly in Mofussil—Grounds for transfer.*] In a partition suit, instituted in the Second Subordinate Judge's Court of the 24-Pergunnahs, the parties being residents of Calcutta, when the property sought to be partitioned consisted of (*a*) moveable property situate in Calcutta; (*b*) immoveable property $\frac{1}{32}$nds of which was in Calcutta, the rest being in the immediate vicinity, and when it appeared that, if tried in Alipore, an Ameen would have to partition the Calcutta property, and that the suit could be more expeditiously and cheaply tried in the High Court: *Held*, that the case was a proper one to be transferred to the High Court to be tried on the original side, and an order was made accordingly. JOTENDRO NATH MITTER *v.* RAJ KRISTO MITTER 771

——— ——— Application for. *See* PRACTICE 771

——— ——— Tenure. *See* BENGAL TENANCY ACT, s. 12 642

Tributary Mehals. *See* JURISDICTION OF CRIMINAL COURT 667

Trust. *See* LIMITATION ACT. 1877, s. 10 161

———. *See* LIMITATION ACT, 1877. ARTS. 59 AND 60 25

Unlawful Assembly. *See* RIOTING ... 206

Usage of Trade. *See* SALE BY AUCTION 702

User. *See* RIGHT OF USER 640

Vakil of High Court. *See* PRIVY COUNCIL, PRACTICE OF 636

Vendor out of possession, Suit by Purchaser for possession when. *See* TRANSFER OF PROPERTY ACT, S. 54 622

——— **and Purchaser**—*Notice—Notice of possession of rent—Notice of tenancy—Purchaser how far affected with notice of lessor's title.*] Notice of possession of the rents of property is notice of the tenancy; but does not of itself affect a purchaser with notice of the lessor's title. *Barnhart* v. *Greenshields*, 9 Moore's P. C., 18, referred to. GUNAMONI NATH *v.* BUSSUNT KUMARI DASI .. 414

Wajib-ul-arz modifying Mitakshara Law. *See* HINDU LAW, GIFT ... 677

Widow. *See* HINDU LAW, GUARDIAN 584

———. *See* HINDU LAW, WIDOW ... 574

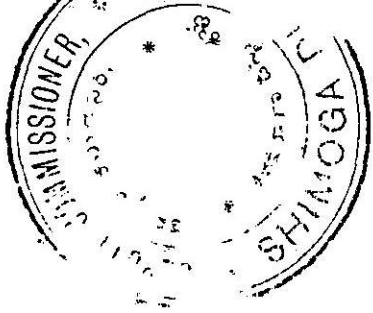
——— **Maintenance of** *See* HINDU LAW, PARTITION 758

Will—*Attestation of will—Purda-nashin lady—"In the presence of"—Succession Act* (X *of* 1865), s. 50.] After execution of her will by a testatrix, a *purda-nashin* lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the Registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the Registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the Registrar, and the person who identified her, at the same time: *Held* that the witness was "in the presence of" the testatrix within the meaning of s. 50 of the Succession Act (X of 1865.) HORENDRA-NARAIN ACHARJI CHOWDHRY *v.* CHANDRA-KANTA LAHIRI 19

Will, Right of Shebaitship under. *See* RES JUDICATA 103

Witness. *See* CRIMINAL PROCEDURE CODE, 1882, s. 488 781

Zemindar's Rights against tenant. *See* LANDLORD AND TENANT ... 223



THE

INDIAN LAW REPORTS,

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APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

RAJRUP SINGH AND ANOTHER (TWO OF THE PRINCIPAL DEFENDANTS) *v.* RAMGOLAM ROY (PLAINTIFF).*

1888 *January* 30

Civil Procedure Code, 1882, *s.* 244—*Question relating to execution of decree—Parties to suit—Representatives.*

K and *M* were brothers alleged to be joint in food, dwelling, and business. In a suit which was brought against *K*, and which was unsuccessfully defended by him on behalf of himself and the joint family, a decree for costs was passed against him. *K* died after decree, and the decree-holder in execution had *K's* sons put on the record as his representatives. Certain property was attached in execution, and the sons objected that the property in question had come to them as the self-acquired property of their uncle *M*, who had died after *K*, and that they had inherited no property from their father *K*. Their objection was allowed by the Court executing the decree, and the property was ordered to be released from attachment. In a suit brought by the assignee of the decree-holder against the sons of *K* to establish his right to proceed against the property in question in execution of the decree against *K*: *Held*, that the question of the liability of the property to be taken in execution in the hands of the defendant was a "question arising between the parties to the suit in which the decree was passed *or their representatives*, and relating to the execution, &c., of the decree" within the meaning of s. 244 of the Civil Procedure Code, and that the suit was consequently not maintainable.

* Appeal from Order No. 152 of 1888, against the order of T. M. Kirkwood, Esq., Judge of Patna, dated the 18th of April 1887, reversing the decree of Baboo Troilokho Nath Mitter, Subordinate Judge of Patna, dated the 5th of February 1886.

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The cases as to the position of representatives added to the suit either before or after decree referred to and discussed.

THE facts in this case were shortly as follows :—

Kheba Singh, the father of the defendants, and his brother Mewa Lal, were joint in food and dwelling, and carried on business jointly as members of a joint family. In a suit which was brought against Kheba Singh, and which had been contested by him on behalf of himself and the joint family, Kheba was unsuccessful, and decrees for costs were passed against him. Kheba Singh having died after the decrees, the decree-holder, in execution of those decrees, substituted his sons as judgment-debtors in their father's place, and they were brought on the record as his representatives. The decree-holder attached certain property, and the defendants objected that they had succeeded to no property from their father, but that the property attached had come to them by inheritance from their uncle Mewa Lal, who had died after their father, and that such property had been Mewa Lal's self-acquired property. On the 22nd March 1884 this objection was allowed, and the property was released from attachment. The present suit was brought on the 21st March 1885 by a purchaser from the original decree-holder to establish his right to proceed against the property in question in execution of the decrees against Kheba Singh.

At the hearing, before the merits of the case were gone into, a preliminary objection was taken that the matter dealt with by the order of the 22nd March 1884 was, within the meaning of s. 244 of the Civil Procedure Code, a "question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution of the decree," and therefore had been properly dealt with by the Court executing the decree, and could not now be the subject of a separate suit.

The Subordinate Judge upheld this objection and dismissed the suit.

On appeal the Judge was of opinion that the proceedings and order of the Court executing the decree were taken and made under ss. 278, 280 of the Code, and not under s. 244, and that the suit was maintainable. He therefore reversed the decree of the Subordinate Judge and remanded the suit for hearing on the merits.

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From this decision the defendants appealed.

Baboo *Nilmadhub Sen* for the appellants.

Moulvie *Mahomed Yusoof* for the respondent.

The following cases were referred to in argument: *Chowdhry Wahed Ali* v. *Jumaee* (1); *Oseemunnissa Khatoon* v. *Ameerunnissa Khatoon* (2); *Arundadhi Ammyar* v. *Natesha Ayyar* (3); *Nimba Harishet* v. *Sitaram Paraji* (4); *Ameeroonissa Khatoon* v. *Mozuffer Hossein Chowdhry* (5); *Buddu Ramaiya* v. *Venkaiya* (6); *Kuriyali* v. *Mayan* (7); *Ram Ghulam* v. *Hazaree Kuar* (8); *Sitaram* v. *Bhagwan Das* (9); *Dhiraj Mahatab Chand* v. *Peari Dasi* (10); *In re Rainey* (11); *Abdul Rahman* v. *Muhammad Yar* (12); *Awadh Kuari* v. *Raktu Tewari* (13); *Shankar Dyal* v. *Amir Haidar* (14); *Nath Mal Das* v. *Tajammul Husain* (15); *Bahori Lal* v. *Gauri Sahai* (16); *Kanai Lal Khan* v. *Sashi Bhuson Biswas* (17); and *Kameshwar Pershad* v. *Run Bahadur Singh* (18).

The following judgments were delivered by the Court (WILSON and MACPHERSON, JJ.):—

WILSON, J.—The plaintiffs are the assignees of a decree obtained against one Kheba Singh; and in this suit they ask for a declaration that certain properties are liable to be attached and sold to satisfy that decree in the hands of the substantial defendants to the suit, who are the sons of Kheba Singh. It appears that after the decree was obtained Kheba Singh died, and that an application was made to execute the decree against the property now in question in the hands of the same persons who are now defendants; and that application was dismissed. Neither the petition nor the order has been put in evidence, and we are therefore obliged to derive our knowledge of them from the

(1) 11 B. L. R., 149.
(2) 20 W. R., 162.
(3) I. L. R., 5 Mad., 391.
(4) I. L. R., 9 Bom., 458.
(5) 12 B. L. R., 65.
(6) 3 Mad., 263.
(7) I. L. R., 7 Mad., 255.
(8) I. L. R., 7 All., 547.
(9) I. L. R., 7 All., 733.
(10) 6 W. R., Mis., 61.
(11) 6 B. L. R., 725.
(12) I. L. R., 4 All., 190.
(13) I. L. R., 6 All., 109.
(14) I. L. R., 2 All., 752.
(15) I. L. R., 7 All., 36.
(16) I. L. R., 8 All., 626.
(17) I. L. R., 6 Calc., 777.
(18) I. L. R., 12 Calc., 458.

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admissions in the plaint, from which we learn that the decree-holders "filed a list of the disputed property as property belonging to the judgment-debtor Kheba Singh;" that the sons alleged in answer that "they had got it from the estate of Mewa Lal and not from the estate of Kheba;" and that by the order then made "the disputed property has been exempted from sale by auction."

The decree was subsequently assigned to the plaintiffs, and they now sue for a declaration that the property in question is liable in the defendant's hands to be attached and sold to satisfy the decree. The Subordinate Judge held that s. 244 of the Code of Civil Procedure was a bar to this suit, and he dismissed it accordingly. The District Judge reversed that decision and remanded the case for trial on the merits. Against that order the present appeal has been brought.

The sections of the Code which it seems necessary to refer to are these:—

Section 234 says: "If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

"Such representative shall be liable only to the extent of the property of the deceased which has come to his hands, and has not been duly disposed of; and for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel the said representative to produce such accounts as it thinks fit."

Section 244 says: "The following questions shall be determined by order of the Court executing a decree and not by separate suit, namely:—

"(*a* & *b*) relate to mesne profits.

"(*c*) any other questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree."

Section 248 says: "The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him;

"(*b*) if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made."

What we have to say is whether the question of the liability of this property to be taken in execution in the hands of the present defendants—a question raised and decided in the execution proceedings, and now raised again in this suit—is a question "arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree," within the meaning of s. 244. And this may be divided into two questions: whether the defendants were and are representatives of the judgment-debtor, and whether the question in dispute is a question between the decree-holders and such representatives in the sense intended by the section.

The provision formerly in force corresponding to s. 244, namely, s. 11 of Act XXIII of 1861, was limited in its operation to questions arising between parties to the suit, and the question arose whether the term "parties" applied to persons who had not been made parties before decree, but against whom execution was sought as heirs of the judgment-debtor upon his death after decree. In the present section the words "or their representatives" have been added; and I entertain no doubt that they apply to persons against whom or against the property in whose hands execution is sought, on the ground that they are the heirs of a judgment-debtor who has died after decree.

As regards the kind of questions intended in s. 244, the matter I think is pretty clear from the provisions of s. 234. Under that section the representative can be made liable "to the extent of the property of the deceased which has come to his hands and has not been duly disposed of." So that two kinds of property can be attached: First, property of the ancestor found in the hands of the heir; and, secondly, the property of the heir, from whatever source derived, to the extent to which he has wasted the assets descended to him without satisfying the debts by the deceased. In the case now before us, the property is of the first kind—property said to be liable to execution in the hands of heirs as assets inherited from their ancestor. In such a case the question

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that ordinarily arises is, whether the property has so descended or not. That is a question in which the parties interested are the judgment-creditor on one side, and the alleged heir himself on the other. The persons interested would be the same if the property against which execution was sought were the property of the heir himself which it was sought to charge on the ground of his having wasted the inherited assets; the provision in s. 234 for taking an account makes this plain. Upon the construction of the words of the section, it appears to me that the question which the plaintiff seeks to raise in this case not only arose, but was decided in the execution proceedings between his vendor and the present defendants brought in as representatives of the original judgment-debtor, and that s. 244 bars this suit.

An examination of the decisions leads to the same result. The cases fall into two classes. The first class consists of cases in which a person is originally made a party in a representative capacity, or is subsequently made a party in consequence of the death of an original party before decree. In this case, it is clearly settled I think that such a person is a party to the suit within the meaning of s. 244, and that a question between him and the decree-holder, as to whether property has come to him as the representative of the judgment-debtor, and so is liable to be taken in execution of the decree against him as such representative, or on the other hand belongs to himself alone and not in such representative character, is one that must be decided in the execution proceedings, and not by suit. The governing authority on the subject is the decision of the Privy Council in *Chowdry Wahed Ali* v. *Jumaee* (1); and it has been followed and applied in the sense I have indicated in several subsequent cases in this country—*Oseemunnissa Khatoon* v. *Ameerunnissa Khatoon* (2); *Arundadhi Ammyar* v. *Natesha Ayyar* (3); *Nimba Harishet* v. *Sitaram Paraji* (4).

The second class of cases consists of those in which the representatives have not been made parties to the suit before decree; but in which, in consequence of the death of the judgment-debtor after decree, a question arises as to the rights of the

(1) 11 B. L. R., 140.
(2) 20 W. R., 162.
(3) I. L. R., 5 Mad., 391.
(4) I. L. R., 9 Bom., 158.

decree-holder to execute the decree against the representatives or the property said to have descended to them.

Under Act XXIII of 1861 it was held, both by the Madras High Court in *Buddu Ramaiya* v. *Venkaiya* (1), and by this Court in *Ameerunnissa Khatoon* v. *Mozuffer Hossein Chowdhry* (2), that representatives proceeded against in execution of a decree against the person they represented, were parties to the suit within the meaning of the section corresponding to the present s. 244. That question, it seems to me, no longer arises, because in s. 244 the representatives are expressly mentioned. In both of those cases, and in a series of subsequent cases, it has been held, in accordance with the analogy of the other class of decisions already mentioned, that questions arising between a decree-holder and the representatives of the judgment-debtor as to whether property has come to the representatives as such, and so is liable to be taken in execution, or is their own property derived from any other source, and therefore not so liable, must be decided in the execution proceeding and not by suit. *Kuriyali* v. *Mayan* (3); *Ram Ghulam* v. *Hazaree Kuar* (4); *Sitaram* v. *Bhagwan Das* (5).

I only know of two cases which seem to me distinctly inconsistent with the law established, as I think by the two classes of decisions to which I have referred—*Abdul Rahman* v. *Muhammad Yar* (6); and *Awadh Kuari* v. *Raktu Tewari* (7). I prefer to follow the view which seems to me most naturally to follow from the language of the Act, and which is supported by the preponderance of authority.

Several cases were cited to us to which I think it unnecessary to do more than refer, because the decisions turned upon considerations which do not apply to the case now before us. They are cases in which it has been held that a claim either by the judgment-debtor or by his representatives to property attached in execution, made not in his own right but as a trustee, does not fall within s. 244. *Shankar Dyal* v. *Amir Haidar* (8); and

(1) 3 Mad., 263.
(2) 12 B. L. R., 65.
(3) I. L. R., 7 Mad., 255.
(4) I. L. R., 7 All., 547.
(5) I. L. R., 7 All., 733.
(6) I. L. R., 4 All, 190.
(7) I. L. R., 6 All., 109.
(8) I. L. R., 2 All., 752.

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Nath Mal Das v. *Tajammul Husain* (1). The more recent case of *Bahori Lal* v. *Gauri Sahai* (2), in which the facts were very peculiar, and quite unlike those of the present case, was decided by one at least of the Judges before whom it came on the ground that it fell within the same principle. It remains to mention two other cases which have been relied upon as inconsistent with the general current of the authorities—*Kanai Lal Khan* v. *Sashi Bhuson Biswas* (3); and *Kameshwar Pershad* v. *Run Bahadur Singh* (4). The first of these cases seems to me to decide nothing touching upon the present question except this,—that where a defendant dies, and some one is substituted, rightly or wrongly, as being his representative, the latter, though he becomes a party, becomes a party to the original suit, the character and scope of which are not enlarged, but remain the same as they were before; and that therefore the person so brought in is not bound to raise in that suit, either before decree or in execution proceedings, any question not properly within the scope of the suit, and not arising out of the execution of the decree actually passed. In *Kameshwar Pershad* v. *Run Bahadur Singh* (4) what was decided, and decided in the execution proceedings, was that a man cannot be made liable in execution as the representative of a deceased judgment-debtor, in respect of property which he has obtained from the judgment-debtor by a title prior to decree, or inherited from somebody else, though he may be so made liable in respect of property inherited from the judgment-debtor after decree.

I am of opinion that the present suit is barred by s. 244, and that the order of the District Judge should be set aside, and the decree of the Subordinate Judge maintained with costs in both Appellate Courts.

MACPHERSON, J.—I am of the same opinion, and hold that the suit is barred by s. 244, and that consequently the order of the District Judge must be set aside, and the decree of the Subordinate Judge restored with costs in both Appellate Courts.

J. V. W. *Appeal allowed.*

(1) I. L. R., 7 All., 36.
(2) I. L. R., 8 All., 626.
(3) I. L. R., 6 Calc., 777.
(4) I. L. R., 12 Calc., 458.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice Rampini.

IN THE MATTER OF THE PETITION OF PARBUTTY CHARAN AICH. 1888
PARBUTTY CHARAN AICH *v.* QUEEN-EMPRESS.* *August 6.*

Criminal Procedure Code, ss. 134, 144—*Penal Code, s.* 188—*Disobeying order of Public Servant—Trader at Hât—Order prohibiting holding of Hât.*

A District Magistrate, by an order made under s. 144 of the Criminal Procedure Code, after stating that it appeared that one "*G O S* has recently established a hât at *S* in the vicinity of *K*, an old-established hât, and held it on the same days, and that in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât instead of the old one, a serious breach of the peace or riots are imminent," ordered "that the said *G C S* and all other persons abstain from holding such hât" on those days. The order was duly made and promulgated, but not strictly in accordance with s. 134 of the Code, and the orders of Government made thereunder. Notwithstanding the order one *P C A* was found exposing goods for sale as a trader at the hât on one of the prohibited days, and he was thereupon charged with disobeying the order of the Magistrate, and convicted of an offence under s. 188 of the Penal Code. *Held*, that the conviction was bad, as *P C A* did not come within the description of the persons intended by the order to be prohibited from "holding" the hât, which referred to "holding" as owner or manager, not as a trader.

Held, also, that the terms of s. 134 of the Code, and the notification made by Government thereunder as to promulgation and issue of an order, are directory, but an omission to follow strictly such direction, though it is an irregularity, does not invalidate the order: where therefore it is shown that the order has been brought to the actual knowledge of the person sought to be affected by it, such omission does not prevent the case coming within s. 188 of the Penal Code.

THE appellant Parbutty Charan Aich was charged with having disobeyed an order made by the Magistrate of Backergunge, and with having in consequence been guilty of an offence under s. 188 of the Penal Code.

It appeared that one Gobinda Chunder Sahu had established a hât in a village called Singhrakati in the District of Backergunge. The Magistrate of the district, finding that such a hât

* Criminal Motion No. 238 of 1888, against the order passed by J. Posford, Esq., Judge of Backergunge, dated 21st June 1888, modifying the order passed by F. A. Hossein, Deputy Magistrate of Patuakhally, dated the 12th May 1888.

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interfered with the previously established hât in the neighbouring village of Krishnagunge, and that a breach of the peace was thereby imminent, issued the following order: "Whereas it appears from the report of Sub-Inspector Prosonno Coomar Mookerjee, and from the affidavit of Baikanto Chunder Gangooly filed herewith, that Gobinda Chunder Sahu has recently established a new hât at Singhrakati in the vicinity of Krishnagunge hât, an old established hât, and held it on the same days, *viz.*, Tuesdays and Saturdays, and that in consequence of the establishment of the new hât, and the endeavours made to induce or force people to frequent the new hât instead of the old one, a serious breach of the peace or riots are imminent, it is hereby ordered that the said Gobinda Chunder Sahu and all other persons abstain from holding such hât, or any hât whatever, near or within the hât at Krishnagunge on any Tuesday or Saturday. This order is made under s. 144 of the Criminal Procedure Code and will remain in force two months."

The order was not served personally on Parbutty Charan Aich, nor was it duly promulgated in the hât by beat of drum, or as provided for by s. 134 of the Code and by Government notification made under that section. Notwithstanding this order the hât at Singhrakati still continued to be held, and on Saturday, 21st January, Parbutty Charan Aich, being found exposing goods for sale in the hât, was charged under s. 188 of the Penal Code with disobeying the above order, and on conviction was sentenced by the Deputy Magistrate to rigorous inprisonment for three months—a sentence which was altered on appeal to the Sessions Judge to seven days' imprisonment and a fine of Rs. 30. The Judge said: "As to Parbutty Charan Aich I see no reason to doubt the propriety of the conviction; but I do not find any satisfactory proof of his being more than a trader who comes to the hât and offers goods for sale there. He does not appear to be one of the hât proprietors or managers, though he is said to have been a *tadbirkar*." Parbutty Charan Aich appealed to the High Court on the grounds that the order of the Magistrate prohibiting the hât was not promulgated in the manner provided by law; that the order being therefore bad, the disobedience of such an order was not punishable under s. 188 of the Penal Code; and that

the act imputed to him did not constitute a disobedience of the order.

Baboo *Umbica Churn Bose* and Baboo *Baikanto Nath Doss* for the appellant.

The *Officiating Deputy Legal Remembrancer* (Mr. *Beeby*) for the Crown.

The judgment of the Court (WILSON and RAMPINI, JJ.) was as follows:—

WILSON, J.—The conviction in this case is under s. 188 of the Indian Penal Code, which says that whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, disobeys such direction, shall be liable to certain punishment. Now, the order which the accused in the present case was charged with disobeying was an order by the District Magistrate under s. 144 of the Code of Criminal Procedure. It was an order made with relation to a hât. It appears that there was an old-established hât, and that certain persons, acting for, or with, one Gobinda Charan Sahu opened a new hât in the vicinity of the old one, and held it on the same days. This action, in the opinion of the Magistrate, made a serious breach of the peace imminent; and therefore having made the necessary inquiries he passed this order. [After reading the order (1) His Lordship continued]:

It has been found that notwithstanding that order the new hât was nevertheless held on Tuesdays and Saturdays; and the present accused has been convicted of disobeying that order. The fact found is that he sold goods in the hât, not that he was a proprietor of the hât, or was one of those who promoted or managed or had any control of it, but simply that as a trader he sold goods at the hât.

Two points have been raised before us. The first is, whether there was any such service or promulgation of the Magistrate's order as to bring the case within s. 188. With regard to that it would appear that the mode of service was not in accordance with the Criminal Procedure Code, because s. 144

(1) *Ante*, p. 10.

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says that a Magistrate may, by a written order stating the material facts of the case and served in manner provided by s. 134, direct any person to abstain from a certain act, and so forth. And what s. 134 says is, that "the order," that is an order under s. 133, "shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons. If such order cannot be so served, it shall be notified by proclamation, published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person." In the present case, there was evidence probably that there was personal service on Gobinda Chunder Sahu. But there was no personal service on the present accused; nor was the service or promulgation in accordance with s. 134. The Bengal Government has gazetted an order to the effect that, when personal service cannot be made, the order shall be notified by beat of drum at the place in question. That was not done in the present case. Therefore the notice was not served according to the directions of the Criminal Procedure Code as amplified by the order in the Gazette. But I do not think that *that* is fatal in the present case, because I do not think that it is necessary for us to read the direction as to the mode of service as going absolutely to the validity of the order. I think we may fairly say that the terms of s. 134 and the notification in the Gazette are directory, and ought to be followed, and that it is an irregularity when they are not; but it does not follow that the order is a nullity in consequence, and I think that when the order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under s. 188 of the Indian Penal Code. The first objection therefore seems to me to fail.

The other objection is more serious, and goes much more to the solid merits of the case. It is this, that what the present accused is found to have done is no breach of the Magistrate's order. It is obvious that before you can proceed criminally

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against a man for breach of an order you must show that the order clearly and unequivocally prohibits the thing which he is said to have done. If the order be ambiguous and open to two interpretations, you must adopt the one most favourable to the accused, and not the other. In the present case the earlier part of the Magistrate's order shows, we think, pretty clearly what he was thinking of when he came to the conclusion that the new hât should be prohibited. He was thinking of the action of Gobinda Chunder Sahu, and of the people who were acting for or with him, that is to say, he was thinking of the conduct of persons who established the hât, opened it, managed it and tried to bring people to it to buy and sell; and having described their action as likely to induce a serious breach of the peace, he proceeds to prohibit Gobinda Chunder Sahu and all other persons from *holding* the hât. In that connection it is almost impossible to read the words "holding the hât" in any other sense than that which we have described, that is, in the sense of holding as owner or manager. It is almost impossible to read the words as including the conduct of people who do not hold the hât as owners and managers, but who frequent it as buyers or sellers. But if we are wrong in this interpretation of the words, at any rate it is clear that the order, looking at it in the most favourable light for the prosecution, is ambiguous, and does not clearly and unmistakably prohibit traders from buying and selling in the hât.

That being so, the conviction cannot stand, and must be set aside.

J. V. W. *Conviction set aside.*

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Rampini.

JOYNARAYAN SINGH (JUDGMENT-DEBTOR) *v.* MUDHOO SUDUN SINGH (ADJUDICATING-CREDITOR).*

1888 *August* 10.

Jurisdiction—Deputy Commissioner—District Court—Insolvent Judgment-debtors—Civil Procedure Code, 1882, *ss.* 344, 360—*Application to be declared insolvent.*

The Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the "District Court" in Chota Nagpur under ss. 2 and 344 of the Civil

* Appeal from Order No. 187 of 1888, against the order of E. N. Baker, Esq., Deputy Commissioner of Manbhoom, dated the 28th of April 1888.

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Procedure Code. A Deputy Commissioner therefore invested by the local Government with powers under s. 360 of the Code has no jurisdiction, apart from any transfer by the "District Court," to entertain an application by a judgment-creditor under s. 344 to have his judgment-debtor declared an insolvent.

In re Waller (1); and *Purbhudas Velji* v. *Chugun Raichand* (2), followed. The question of jurisdiction not having been raised in the lower Court the order was set aside without costs.

THIS was an application under the second clause of s. 344 of the Civil Procedure Code by the holder of a decree for money, praying that the judgment-debtor might be declared insolvent.

The only question material to this report was as to the jurisdiction of the Court of the Deputy Commissioner to entertain the application.

Mr. *R. Allen*, Baboo *Ashutosh Dhur*, and Baboo *Rajendronath Bose* for the appellant.

The *Advocate-General* (Sir *G. C. Paul*), Mr. *Woodroffe*, and Baboo *Pran Nath Pandit* for the respondent.

The judgment of the Court (WILSON and RAMPINI, JJ.) was as follows:—

WILSON, J.—This is a matter brought before us by way of appeal from an order of the Deputy Commissioner of Manbhoom in Chota Nagpur. Acting under Chapter XX of the Code of Civil Procedure he made an order adjudging a judgment-debtor to be an insolvent, and he did so on the application of the judgment-creditor.

We find ourselves constrained to set aside that order on a ground which unfortunately has no relation to the merits of the case. The ground upon which we are obliged to set aside the order is that the Deputy Commissioner had no jurisdiction to make it.

Under s. 344 of the Civil Procedure Code "any judgment-debtor arrested or imprisoned in execution of a decree for money, or against whose property an order of attachment has been made in execution of such a decree, may apply in writing to be declared an insolvent;" and "any holder of a decree for money may apply in writing that the judgment-debtor may be declared an insolvent;" and "every such application shall be made to the District

(1) I. L. R., 6 Mad., 430. (2) I. L. R., 8 Bom., 196.

Court within the local limits of whose jurisdiction the judgment-debtor resides or is in custody." "District Court" is defined thus in s. 2 of the Code: "District means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a District Court)." So that in order to see whether the Deputy Commissioner's Court is a District Court, we have to inquire whether it is a principal Civil Court of original jurisdiction within the district. We find that it is not so. The principal Civil Court of original jurisdiction throughout Chota Nagpur is the Court of the Judicial Commissioner. By gazetted order of the Local Government the Judicial Commissioner is given the jurisdiction of a District Judge throughout Chota Nagpur, and the Deputy Commissioners are given the jurisdiction of Subordinate Judges. It follows that the Deputy Commissioner was not empowered to make such an order as this by the operation of s. 344. But then we have to turn and see whether he has power under s. 360. Under that section "the local Government may, by notification in the Official Gazette, invest any Court, other than a District Court, with the powers conferred on District Courts by ss. 344 to 359 (both inclusive), and the District Judge may transfer to any Court, &c."

We find by reference to the Gazette that the Deputy Commissioner's Court has been invested by the Local Government with the powers that s. 360 authorises that Government to confer. But then in order to see what the powers conferred are we must look at the latter part of s. 360, which says, when such notification has been issued "the District Judge may transfer to any Court situate in his district and so invested any case instituted under s. 344. Any Court so invested may entertain any application under s. 344, by any person arrested in execution of a decree of such Court." So that when a Court, other than a District Court, is specially invested with powers under s. 360, those powers authorise it to deal with two classes of cases: First, cases transferred by the District Court; and, secondly, cases of persons who are in custody in execution of its own decree and who apply under the insolvency section. But there is no power given by s. 360 to any Court other

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than the District Court itself to entertain, apart from any transfer by the District Court, an application by a judgment-creditor to have his judgment-debtor declared an insolvent. This appears clear from the language of the section itself; and the same view has been taken by the Madras and Bombay High Courts. See *In re Waller* (1), and *Purbhudas Velji* v. *Chugun Raichand* (2). It follows therefore that there was no jurisdiction in the Deputy Commissioner to make the order he has made. On that ground we set his order aside.

We find that this objection to jurisdiction was never taken in the first Court. It was not taken in the grounds of appeal to this Court, and indeed it was raised by the Court itself, and not by either of the parties. Under these circumstances, we may fairly set the order aside without costs.

Then an application was made to us by the Advocate-General to order the return of the petition presented to the lower Court, in order that it might be presented again to the Court which has jurisdiction. That is a matter with which we think we ought not to interfere. It should be dealt with by the lower Court.

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Rampini.

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August 2.

JOGOBUNDHOO DASS AND ANOTHER (JUDGMENT-DEBTORS) *v.* HORI RAWOOT AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, 1882, *s.* 230, *cl.* (*b*)—*Limitation—Execution of decree—Order directing payment of money at a certain date.*

A judgment-debtor on being arrested in execution of a decree presented a petition asking for fifteen days' time to pay the amount of the decree, and, the decree-holders consenting, the Court made an order in the terms, "let the petition be filed." *Held*, that this order did not amount to one directing payment of money to be made at a certain date within the meaning of s. 230, cl. (*b*) of the Civil Procedure Code.

Bal Chand v. *Raghunath Das* (3) followed.

* Appeal from Order No. 7 of 1888, against the order of J. B. Worgan, Esq., Judge of Cuttack, dated the 8th of September 1887, reversing the order of Baboo Mati Lal Singh, Munsiff of that district, dated the 29th of March 1887.

(1) I. L. R., 6 Mad., 430. (2) I. L. R., 8 Bom., 196.
(3) I. L. R., 4 All., 155.

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THIS was an application made on the 18th November 1886 for execution of a decree dated 9th January 1874. It appeared that on the 21st August 1882 one of the judgment-debtors, on his being arrested in execution of the decree, had presented a petition to the Court for fifteen days' time to pay up the amount of the decree, which petition (the decree-holder consenting) was ordered to be filed, and the time was allowed, the judgment-debtor being released from arrest. He failed, however, to pay the amount of the decree. The only question material to this report was whether the order made on this petition amounted to a direction by the Court for "the payment of money on a certain date" within the meaning of s. 230, sub-section (*b*).

The decree-holder contended that it did, and that he was therefore entitled to reckon the twelve years' limitation from the expiration of the fifteen days' time when default was made in paying the amount of the decree. The judgment-debtor contended that execution of the decree was barred by limitation which was to be reckoned from the date of the decree, and that the order made on the petition did not create a new starting point from which the time could run.

The lower Appellate Court (reversing the decision of the Munsiff, before whom however the point as to the effect of the order on the petition was not raised) held that the order was virtually one under s. 230, cl. (*b*), and that execution of the decree was therefore not barred.

From this decision the judgment-debtors appealed to the High Court.

Baboo *Mon Mohun Dutt* for the appellants.

Dr. *Guru Dass Banerji* for the respondents.

For the appellants the case of *Bal Chand* v. *Raghunath Das* (1) was relied on, and for the respondents the case of *Jhoti Sahu* v. *Bhubun Gir* (2) was referred to.

The judgment of the Court (WILSON and RAMPINI, JJ.) was as follows:—

WILSON, J.—In this case we think that the lower Appellate Court is in error in the view it has taken of the law.

(1) I. L. R., 4 All., 155. (2) I. L. R., 11 Calc., 143.

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The application was one for execution, and was made more than twelve years after the date of the decree. In the first Court the Munsiff dismissed the application on that ground, the application being, in his opinion, too late under s. 230 of the Code of Civil Procedure. The lower Appellate Court has considered that the application is saved from the bar of limitation by reason of sub-section (*b*) of s. 230, which says: "Where the decree or any subsequent order directs any payment of money, or the delivery of any property, to be made at a certain date, 'the twelve years is to run from the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree.'"

Now it is sought to show that there was a subsequent order directing payment to be made on a certain date by reason of these circumstances: A prior application for execution by attachment of the person of one of the judgment-debtors was made within twelve years of the date of the decree and within twelve years previous to the date of the present application. When that judgment-debtor had been arrested he put in a petition asking that he might have fifteen days' time within which to pay up the amount of the decree and so escape committal to prison. That petition was consented to, and the order made on it was, "let the petition be filed." The lower Appellate Court has considered that that order amounts to an order to pay on or before the 15th day. We think that *that* is a very considerable extension of the order. In form certainly it is nothing of the kind; and even if we could suppose that the order adopts the terms of the petition, and can be read as embodying what appears in the petition, still it would not be an order for payment. The petition contains no new promise to pay; it simply asks for a stay of proceedings for fifteen days to enable the petitioner to pay up the amount of the decree—the alternative obviously being that, on expiry of the fifteen days, if the money was not paid, the execution proceedings should go on. This case therefore differs materially from the case of *Jhoti Sahu* v. *Bhubun Gir* (1). In that case there was not a mere petition for time, but an actual agreement by way of compromise entered

(1) I. L. R., 11 Calc., 143.

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into between the parties for payment in certain ways; and the order was, that it should be recorded. The learned Judges in that case considered that the order there might be regarded as one embodying the compromise, and that, the compromise being an actual undertaking to pay, the order was an order to pay. On the other hand in the case of *Bal Chand* v. *Raghunath Das* (1) the facts are precisely similar to those of the present case; and the learned Judges there took the same view as we have taken here. For these reasons we think that the view taken by the lower Appellate Court cannot be supported.

The result is that the order of the lower Appellate Court must be set aside, and the order of the first Court, the Munsiff, affirmed, with costs.

J. V. W. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice Ghose.

HORENDRANARAIN ACHARJI CHOWDHRY (PLAINTIFF) *v.* CHANDRAKANTA LAHIRI AND ANOTHER (DEFENDANTS).*

1888 *August* 10.

Will—Attestation of will—Purda nashin lady—"In the presence of"—Succession Act (X of 1865), *s.* 50.

After execution of her will by a testatrix, a *purda nashin* lady, and its attestation in her presence by a witness who had seen her execute it, it was presented for registration, the testatrix sitting behind one fold of a door which was closed, the other fold being open, and the registrar and another person who identified the testatrix being in the verandah outside the room behind the door of which the testatrix sat, all that the registrar actually saw of her being her hand. The testatrix admitted her execution of the will, and her admission was endorsed on the will and witnessed by the registrar and the person who identified her at the same time. *Held*, that the witness was "in the presence of" the testatrix within the meaning of s. 50 of the Succession Act (X of 1865).

THIS appeal was brought in the matter of an application for probate of the will of one Rudramani Debya, a *purda nashin* lady, widow of one Kalichundra Lahiri. The will was executed on the 24th Kartick 1291 (8th November 1884), and the testatrix died on the 24th Aughran 1291 (8th December 1884).

* Appeal from Original Decree No. 67 of 1887, against the decree of J. R. Hallett, Esq., Judge of Rungpore, dated the 5th of February 1887.

(1) I. L. R., 4 All., 155.

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The only question material to this report was whether the attestation of the will was sufficient to satisfy the requirements of s. 50 of the Succession Act (X of 1865). The evidence showed that, though the will was executed in the presence of the witnesses, only one of the witnesses, *viz.*, Shurut Chunder Bandopadhya, who was also the writer of the will and had signed it for the testatrix in her presence and by her direction, signed it in the presence of the testatrix; the other witnesses having been told by the testatrix to go and sign it downstairs because she wanted to perform her *puja*. A commission was issued for the examination of other witnesses, one of whom stated that one of the other witnesses to the will also signed the will in the presence of the testatrix, but his evidence as to this was disbelieved by the Judge. It appeared, however, that, the Registrar of Calcutta having been sent for, the will was on the same day presented for registration, when execution was admitted to the Registrar by the testatrix, who was identified by her medical attendant Kedarnath Singha, both the Registrar and Kedarnath Singha signing their names as witnesses. At the time of the registration the testatrix was inside a room behind one fold of a door, the other fold of which was open, and the Registrar and the other witnesses were in the verandah into which the door opened.

The cases of *In the goods of Roymony Dossee* (1), *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (2), and *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (3), have decided that if a signature on a will is admitted by the testator to be his, and he is identified before the Registrar by one of the witnesses to the signature, and both the Registrar and identifier sign their names as witnesses to the admission made, such an attestation is sufficient to satisfy s. 50 of the Succession Act. The only question in the present case was whether the signatures were affixed "in the presence of" the testatrix within the meaning of that section. The evidence of the Registrar was not before the lower Court, and that Court thought the evidence of the witness examined on the commission, who stated he had signed the will in the presence of the testatrix, unsatisfactory, and refused the application for probate.

(1) I. L. R., 1 Calc., 150. (2) I. L. R., 6 Calc., 17.
(3) I. L. R., 11 Calc., 429.

The applicant appealed to the High Court.

Mr. *Woodroffe*, Baboo *Grish Chunder Chowdhry*, and Baboo *Horendro Nath Mukerji*, for the appellant.

Baboo *Hem Chunder Banerjee*, and Baboo *Jadub Chunder Seal*, for the respondents.

For the appellant it was contended that the attestation was sufficient. The test is whether the testatrix could have seen the witnesses had she chosen to look—Williams on Executors, 8th Ed., p. 93; *In the goods of Piercy* (1); *Newton* v. *Clarke* (2); *Casson* v. *Dade* (3); *In the goods of Trinmel* (4); *Shires* v. *Glascock* (5); *Day* v. *Smith* (6); *Todd* v. *Winchelsea* (7); *Norton* v. *Basset* (8). The cases on this point where the attestation was held to be insufficient are cases where, under the circumstances, the testator could not have seen the witnesses even had he desired to do so.

It was only absolutely necessary at the registration of the will that there should be *one* witness, as the execution had already been attested by one witness, and it is not necessary that both the witnesses should sign at the same time.

For the respondents on this point the following cases were cited: *Doe* v. *Manifold* (9); *Winchelsea* v. *Wauchope* (10); *In the goods of Killick* (11); *In the goods of Newman* (12); *In the goods of Ellis* (13); *In the goods of Colman* (14); *Tribe* v. *Tribe* (15).

The judgment of the Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This is an appeal against a decree of the District Judge of Rungpore, refusing probate of a will alleged to have been executed by Rudramani Debya. The judgment of the Court below is very short; and it is not quite clear from that judgment whether

(1) 1 Robert, 278.
(2) 2 Curt., 320.
(3) 1 Bro. C. C., 99.
(4) 11 Jur. N. S., 248.
(5) 2 Salk., 688.
(6) 3 Salk., 395.
(7) M. and Malk., 12; S. C. 1 C. & P., 488.
(8) Dea and Sw., 253.
(9) 1 M. and S., 249.
(10) 3 Russ., 441.
(11) 10 Jus. N. S., 1083.
(12) 1 Curt., 914.
(13) 2 Curt., 395.
(14) 3 Curt., 118.
(15) 1 Robert, 775.

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the Court below disbelieved the *factum* of the will or refused probate merely because the requirements of the law, as stated in s. 50 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, had not been fulfilled in the matter of attestation.

The learned counsel, who argued the appeal on behalf of the appellant-petitioner for probate, assumed in opening that the *factum* of the will was undisputed, and that it was left to him to argue only the point as to due attestation.

The learned vakil, however, who appeared for the respondents, strenuously contended that the will was not genuine, in addition to the defect in attestation. Section 50 of the Indian Succession Act requires, for the due execution of a will, that it shall be signed or marked by the testator, or, at his request, by somebody on his behalf, in the presence of two witnesses, and that the witnesses who attest it must sign the will in the presence of the testator. In the present case it appeared at the trial that only one of the attesting witnesses had signed the will in the actual presence of the testatrix. The first witness examined stated that, when the testatrix had signed the will, she desired the rest of the persons present to go downstairs, as she wished to perform her *puja*, and that the other witnesses signed in a room below, where the testatrix could not see them. This being the state of things shown in the District Court at the first hearing, a commission was issued to examine certain witnesses in Calcutta. One of these witnesses supplemented the case of the petitioner, so far as he said that one of the witnesses signed in the presence of the testatrix; but the District Judge disbelieved his evidence on this point, and possibly disbelieved the whole evidence in support of the will. But in the result he held that probate should not be granted, and dismissed the application.

At the close of the learned Counsel's address for the appellant we were prepared to call for further evidence as to the attestation, because it appeared that the will itself had been registered, and the endorsements on the back purported to show that the will having been acknowledged by the testatrix in the presence of the Registrar and other persons, the Registrar and another witness signed the endorsement showing that she had admitted the

execution. And previous cases, decided in this Court, have held that such attestation by the Registrar would be sufficient. We have been referred to the case of *Hurro Sundari Dabya* v. *Chunder Kant Bhuttacharjee* (1), and to another case, *Nitye Gopal Sircar* v. *Nagendra Nath Mitter* (2), in which we ourselves were Judges, and in which we followed the law as laid down in the previous case. But upon hearing the respondents' pleader we found that he disputed the *factum* of the will itself. Therefore, before making up our mind to have further evidence, we thought it proper to hear him out. He urged many points against the will being accepted as a genuine document. He pointed out that the applicant for probate himself did not come forward to depose, nor did any other member of the family. He also pointed out discrepancies in the evidence, and he relied upon the state of the record, as it stood, as fully supporting the judgment of the lower Court. Assuming that judgment to be one against the *factum* of the will itself, he of course also relied upon the defect in the attestation which the learned counsel for the appellant had been compelled to admit. But upon a full consideration of the evidence we came to the conclusion that the document was unquestionably genuine, that is, the testatrix had really and intentionally signed it herself, fully knowing what its purport was. That being so, we considered it necessary, in order to come to a proper judgment in the case, to obtain the evidence of the Registrar of Calcutta and the other witness whose name appears on the endorsement. It seemed to us that, if the Registrar was in a position to prove beyond doubt that he had actually signed this endorsement in the presence of the testatrix, his evidence would be sufficient to complete the case of the petitioner. We accordingly adjourned the hearing to this day. And to-day we have examined the Registrar and Baboo Kedarnath Singha, the other witness.

As regards Baboo Kedarnath Singha, we are not able to place any great reliance upon his statement. But as regards the evidence of Baboo Pertap Chunder Chose, the Registrar of Calcutta, we think it unexceptionable, excepting so far as his

(1) I. L. R., 6 Calc., 17. (2) I. L. R., 11 Calc., 429.

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memory, after the lapse of four years, has deceived him. There is a discrepancy between his evidence and that of Kedarnath Singha as to the particular place in which the registration was effected, that is to say, whether it took place upstairs or downstairs, and whether the Registrar was in the verandah outside the room in which the testatrix sat, or in the same room. Speaking for myself, what weighs with me most in the Registrar's evidence is his positive assurance that in such a case as this he never omits to make the endorsements and sign them then and there in the presence of the executant. He was asked if he had ever postponed making the endorsements until he returned to his office, then filling up the endorsements at his leisure; and he said that he never did so: and he also stated that he was especially careful in the case of a will to satisfy himself that the executant knew what the contents of the document were. He tells us that the testatrix in this case was decidedly an intelligent lady, and she repeated the substance of the contents of the will. From his evidence it would appear that he and the other witness were in the verandah outside the room, behind the door of which the lady sat. He remembers that she sat behind one fold of the door which was closed, and the other fold open, she being seated behind the fold closed; he also stated that all he saw of her was her hand. The question is therefore whether he was in her presence within the meaning of s. 50. It seems to have been held in English cases that "in the presence of the testator" would include his being in such a position that he could, if he chose, see the witnesses. We think that the testatrix in this case, if she sat behind one fold of the door, the Registrar being admittedly outside in the verandah, might, if she chose, without leaving her seat, have seen him by putting her head forward. It is obvious that it is not absolutely necessary that the testator should actually see the witnesses who attest the will, because a blind person may execute a will. It has been held in England that if a blind person is so placed as, if he had not been blind, he could have seen the witnesses, these witnesses were in his presence within the meaning of the law. That is the case of *In the goods of Piercy* (1). There is another case—*Newton* v. *Clarke* (2)—

(1) 1 Robert, 278. (2) 2 Curt., 320.

in which the testator signed his will while lying in his bed. There were two attesting witnesses, one of whom the testator could see and could be seen by him, and the other witness was so placed behind a curtain that neither could he see, nor could be seen by, the testator; it was held, however, that both witnesses were sufficiently in the presence of the testator to make their attestation valid. That we think is a very fair case to follow in the case of a *purda nashin* lady. It is unquestionable that had the fold of the door been removed the testatrix in this case would have been able to see the witnesses who signed and attested her will. It also appears to our mind that the testatrix could have seen them by putting her head forward.

That being so, we think probate of the will should be granted.

We accordingly set aside the decree of the lower Court, and decree the appeal. But under the circumstances we do not think we ought to make the respondent pay the costs, for upon the evidence before the District Judge he was right in refusing probate

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

ISHUR CHUNDER BHADURI (PLAINTIFF) *v.* JIBUN KUMARI BIBI (DEFENDANT).*

1888 *July* 27.

Limitation Act, 1877, *Arts.* 59 *and* 60—*Money deposited—Banker and Customer—Money lent—"Deposit"—"Trust"—Cause of action—Demand.*

The plaintiff deposited from time to time with the firm of the defendant, who carried on a banking business, various sums of money, the amounts deposited bearing interest, and at times certain sums being withdrawn by the plaintiff, and an account of the balance of principal and interest being struck at the end of each year and presented to the plaintiff. The date of the first deposit was not known, but it was some time previous to 1282 (1875). A demand was made for the whole amount of the principal and interest in Bhadro 1292 (August—September 1885), and the demand not having been complied with, a suit to recover the money was brought on the 8th March 1886. *Held*, that s. 60 and not s. 59 of the Limitation Act was applicable to the case; the cause of action therefore arose at the date of the demand and the suit was not barred.

* Appeal from Appellate Decree No. 1933 of 1887, against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 29th of June 1887, reversing the decree of Baboo Bulloram Mullick, Subordinate Judge of that district, dated the 29th of December 1886.

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The *dictum* of WHITE, J., in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1), that "the word 'deposit' in the Limitation Act as distinct from 'loan' points to cases where money is lodged with another under an express trust or under circumstances from which a trust may be implied," dissented from.

IN this case the plaintiff in his plaint stated that there was a money-lending business carried on in the names of the defendant's husband Meher Chand and her son Golap Chand Nowlakha at Bander Nil, Serajgunj; that his brother, the late Brojo Sunder Bhaduri, used "to deposit money from a long time in the *tahabil* of the said business," in the name of his eldest brother, the late Ram Sunder Bhaduri, and in his own name,-and he used to draw interest, &c., on the same; that after the death of the said Brojo Sunder Bhaduri in 1282 (1875) the plaintiff used to deposit money with the defendant's firm, and received up to the month of Bysakh 1290 (April 1883) interest, &c., from the same through his brother Grish Chunder Bhaduri; that the amount of interest on the money deposited was at the rate of eight annas per cent. per mensem, and that the sum of Rs. 3,866-4-7½ was due to him on account of principal and interest; that a hundi was drawn on the 22nd Srabun 1292 (6th August 1885) on the defendant's firm at Calcutta, but that it was dishonored, and that subsequently in Bhadro 1292 (August 16th—September 16th 1885) Grish Chunder Bhaduri went to the defendant's place of business in Calcutta, and demanded the money, which, however, was not paid. The plaintiff consequently on 8th March 1886 instituted this suit for the amount claimed, stating that his cause of action arose in Bhadro 1292, when the demand was made.

The only defence material to this report was that the suit was barred by limitation, the defendant not admitting the statements in the plaint "as to the time when and circumstances under which the cause of action arose."

The Subordinate Judge, as to the facts of the case, said in his judgment:—

"It is admitted that defendant owned and carried on banking business at Serajgunj under the name of Meher Chand and Golap Chand. The firm used to receive deposits of money from various parties, and paid interest thereon

(1) 6 C. L. R., 470.

at stipulated rates. In respect of petty deposits no interest was paid. It appears that the firm closed business about the end of 1288 B. S. (March—April 1882), when the manager left Serajgunj and a subordinate officer was left in charge for purposes of a winding up. There is no dispute that one Brojo Sunder Bhaduri deposited in the firm divers sums of money in the name of Ram Sunder Bhaduri and Brojo Sunder Bhaduri. The date of the first deposit is not known, but it is manifest from the proceedings that the amounts deposited carried interest, that divers sums were withdrawn, and an account was struck at each year's end. An abstract of the account was furnished to the depositors under the hand of the defendant's servant. In 1282 B. S. Brojo Sunder died, but the account was continued by his brother Grish Chunder, who followed the footsteps of his deceased brother till the collapse of the firm. It is alleged in the plaint that the business carried on with defendant's firm partook of the nature of a trust, that the rate of interest stipulated for was 8 annas per cent. per month, and that it lasted until Bysakh 1290 B. S., when interest was paid for the last time. It is alleged that on the 22nd Srabun 1292 defendant dishonored a hundi for Rs. 2,000 drawn upon her; and a demand for the withdrawal of the whole of the deposit, including interest, made in Bhadro following not having been complied with, the present suit has been brought for its recovery. Certain damages are also claimed as having been sustained in consequence of the dishonor of the hundi and non-compliance with the demand. The present suit has been brought by the plaintiff as executor to the estate of Brojo Sunder Bhaduri, deceased. Defendant, in her written statement, has little to say against the claim of the plaintiff on the merits, and her vakeel has distinctly given me to understand that in regard to the merits it is not her intention to raise a contest."

On the question of limitation the Subordinate Judge held that the case was governed by Art. 60 of Sch. II of the Limitation Act of 1877; that the period of limitation ran from the date of the demand; and that, the demand having been made within three years before the institution of the suit, the suit was in time. He accordingly gave the plaintiff a decree for the amount due.

The Judge on appeal held that the suit was one for money lent, and was governed by Art. 59, Sch. II of the Limitation Act, under which limitation began to run from the time when the loan was made. He, therefore, held that the suit was barred, and reversing the decision of the Subordinate Judge dismissed the suit.

From this decision the plaintiff appealed.

Baboo *Jadub Chunder Seal* for the appellant.

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Baboo *Mohesh Chunder Chowdhry*, Dr. *Rash Behari Ghose*, and Baboo *Sharoda Churn Mitter*, for the respondent.

The following cases were referred to :—

Hingun Lall v. *Debee Pershad* (1) ; *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (2) ; *Tarini Prasad Ghose* v. *Ram Krishna Banerjee* (3) ; *Brammayi Dasi* v. *Abhai Churn Chowdhry* (4) ; *Nasir bin Abdul Habib Fazal* v. *Dayabhai Itchachand* (5) ; and *Jaffree Begum* v. *Mahomed Zahoor Ahsun Khan* (6).

The judgment of the Court (WILSON and O'KINEALY, JJ.) was as follows :—

This is a suit against a banker, or his representative by the representative of an alleged customer of the bank, to recover money deposited with interest.

(After stating the facts as above, and noticing other grounds on which the lower Appellate Court had reversed the decision of the first Court, the judgment continued.)

The remaining ground on which the decree of the first Court was reversed, the ground of limitation, gives rise to more difficulty. The question is whether the case is governed by Art. 59 or Art. 60 of Sch. II of the Limitation Act. Art. 59, dealing with "money lent under an agreement that it shall be payable on demand," prescribes a period of three years from the time "when the loan is made." Art. 60, dealing with "money deposited under an agreement that it shall be payable on demand," prescribes three years from the time "when the demand is made." If the former of these articles governs the case as held by the lower Appellate Court, the suit is barred. If the latter governs, as held by the first Court, the suit is in time.

There can be little doubt probably that the money of a customer in the hands of his banker is money lent. And that Art. (59) might apply to the case if Art. 60 were not present. Probably too on the same supposition such money would often be money received to the use of the customer within the meaning of Art. 62. But the question is not whether such a case is

(1) 24 W. R., 42.
(2) 6 C. L. R., 470.
(3) 6 B. L. R., 160.
(4) 7 B. L. R., 489.
(5) 10 Bom., 300.
(6) 2 N. W., 409.

covered by the words of Art. 59 or any other article, but whether Art. 60 applies to it; for if it does, the more specific provision must prevail.

Assuming money paid to a man's credit with his banker to be money lent to the latter, the loan is at least of a very special kind, having many peculiarities, which have often been pointed out. And the question is whether such a transaction is a deposit within the meaning of Art. 60. That in ordinary and popular language it is so there can, we think, be no doubt. Take up a newspaper, and look at the returns of any bank which publishes the details of its position, and you will always find public and private deposits used in the sense of balances. Indeed "deposit" seems to us the word which any one not a lawyer would be more likely to use than any other to express money in a bank.

In the schedule in question the term "deposit" or its correlatives are used in the article now in question, and in Arts. 133 and 145. In the latter two instances, which have to do with moveable property, it is clear from the context that the deposit meant is a deposit of goods to be returned in specie, and that is in accordance with the old use of "deposition," with which all lawyers are familiar. In Art. 60, dealing with money, it is equally clear that a return in specie is not contemplated. It is so first, because it would be contrary to the ordinary usage of the language to hold such a thing; deposits of money are made, for instance, under many Acts of the Legislature with public officers and others, and no one ever heard of the idea of the return of the identical coins deposited. It is clear, secondly, because the word "payable" excludes such an idea.

So far as the Act itself is concerned then, we have, in order to give a meaning to Art 60, to find a case in which one man places his money in the hands of another, on the terms that an equivalent sum is to be paid back on demand, and a case to which, according to the ordinary usage of the language, the term "deposit" is applicable. And we think the case of the banker and his customer is exactly such a case.

Turning to the authorities, the decisions upon the earlier Limitation Acts do not seem to afford any assistance. There was in them no provision like that in Art. 60. The only

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provisions as to deposits corresponded rather to Art. 145 and clearly contemplated the return of goods in specie.

The meaning of Art. 60 in the schedule to the present Act has been considered in the case of *Ram Sukh Bhunjo* v. *Brohmoyi Dasi* (1). That case came on second appeal before White and Maclean, JJ. The facts are thus stated in the judgment of White, J.: "It has been found by the lower Appellate Court that in 1861 the plaintiff deposited Rs. 1,000 with the defendant's father, who was to pay upon it interest, which was originally fixed at 15 per cent., but was subsequently reduced to 12 per cent., and that up to the close of the year 1282, corresponding with 1876, the plaintiff regularly received her interest. The agreement made at the time of the deposit was, that the money be repayable on demand." That learned Judge then says that "the lower Appellate Court considers that the transaction was a deposit, and that as the demand was alleged to have been only recently made, the plaintiff is not barred." He dissents from the view that the transaction was a deposit; but he held that, viewing the case as one of loan, the same result followed, for interest had been paid within three years. In giving his reasons for not regarding the case as one of deposit under Art. 60 the learned Judge said: "In my opinion the transaction, though called a deposit, was in point of law a loan upon which interest was to run." We quite concur in thinking that the mere use of the term "deposit" cannot alter the substance of the transaction. And in that case, so far as appears from the report, the borrower was not a banker or a person carrying on any business analogous to banking; nor did the lender keep with him anything similar to a banking account. But the learned Judge added: "I think that the word 'deposit' in the Limitation Act, as distinct from 'loan,' points to cases where money is lodged with another under an express trust, or under circumstances from which a trust may be implied." Maclean, J., is only reported to have said: "I concur in dismissing the appeal." There is nothing to show whether he concurred in the view just cited as expressed by White, J., and that view was obviously not necessary to the decision of the case. We are unable

(1) 6 C. L. R., 470.

to concur in the view there expressed by White, J. Had it amounted to a decision of the Bench, we should have thought it necessary to refer the present case to a Full Bench, but as it does not do so, we are bound to act on our own view of the law.

For several reasons we think "deposit" cannot have been used to mean "trust." In the first place, so to hold appears to be giving a wholly new meaning to the word, for which there is no sanction in popular usage or in the ordinary terminology of the law, or in the context in which the word occurs. In the second place, the case of trust is elsewhere provided for in the Limitation Act. Thirdly, to apply Art. 60 to express trusts might lead to great confusion, and might curtail very seriously the beneficial effects of s. 10 of the Act.

We think, therefore, that the suit is not barred by limitation, and that the decree of the lower Appellate Court must be set aside and that of the Subordinate Judge affirmed with costs in all the Courts.

J. V. W. *Appeal allowed.*

Before Mr. Justice Pigot and Mr. Justice Gordon.

IN THE MATTER OF THE APPLICATION OF PORESH NATH CHATTERJEE *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (REPRESENTED BY THE COLLECTOR OF 24-PERGUNNAHS) AND OTHERS.*

1888 *August* 3.

Appeal—Additional Judge—District Judge—Land Acquisition Act (X of 1870), s. 39—Civil Procedure Code (Act XIV of 1882), s. 647.

An Additional Judge appointed to hear cases under the Land Acquisition Act, 1870, is a District Judge within the meaning of s. 39 of the Act. Under s. 647 of the Civil Procedure Code an appeal from the decision of an Additional Judge so appointed lies to the High Court.

THIS was an appeal to the High Court from the order of the Additional Judge of the 24-Pergunnahs, hearing cases under the Land Acquisition Act, 1870, dated the 6th March 1888, refusing to set aside his order of the 1st March made *ex parte*.

Baboo *Horendra Nath Mukerji* for the appellant.

* Appeal from Order No. 209 of 1888, against the order of R. F. Rampini, Esq., Additional Judge of 24-Pergunnahs, dated the 6th of March 1888.

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PORESH NATH CHATTERJEE v. SECRETARY OF STATE FOR INDIA IN COUNCIL.

Baboo *Unnoda Prosaud Banerji* and Moulvie *Seraj-ul-Islam* for the respondents.

Moulvie *Seraj-ul-Islam* took a preliminary objection that an appeal did not lie to the High Court. He contended that an Additional Judge was not a District Judge within the meaning of s. 39 of the Land Acquisition Act, 1870; and that, therefore, an appeal did not lie to the High Court, but to the District Judge. He further contended that the only section of the Civil Procedure which gave a right of appeal against an order rejecting an application to set aside an *ex parte* order or decree was s. 588, cl. 9; but that this section was not applicable to proceedings under the Land Acquisition Act, inasmuch as the sections of the Civil Procedure Code applicable to such proceedings were specified in s. 36 of the Land Acquisition Act and s. 588 was not included in it.

Baboo *Horendra Nath Mukerji* was not called upon to argue this point.

The judgment of the Court (PIGOT and GORDON, JJ.) was as follows:—

As to the preliminary objection taken, we hold that an Additional Judge appointed to sit to hear cases under the Land Acquisition Act is a District Judge within the meaning of s. 39, and we think that, having regard to the provisions of s. 647, Code of Civil Procedure, an appeal lies to this Court.

As to the appeal itself, we think that there is no ground on which it can be sustained, and we therefore dismiss the appeal with costs to the respondent, who appears, other than the Secretary of State. We give no costs to the Secretary of State, who appeared, but stated that he had no interest in the matter.

C. D. P. *Appeal dismissed.*

Before Mr. Justice Norris and Mr. Justice Beverley.

1888
August 4.

BHIM SINGH (PLAINTIFF) *v.* SARWAN SINGH (DEFENDANT).*

Sale in execution of decree—Failure by purchaser to make the deposit required by s. 306 *of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of* 1882), *ss.* 244, 306, 308, 311 *and* 312.

Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per centum on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie.

Intizam Ali Khan v. *Narain Singh* (1) dissented from.

THE facts of the case which gave rise to this appeal were as follow:—

The defendant Sarwan Singh and one Kashi Nath Pandey had both obtained money decrees against the plaintiff Bhim Singh, and had proceeded to execute them at the same time. The plaintiff's 8 annas share in mouzah Manamath being attached in execution of one of the decrees, an order was passed under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders; and thereafter the property was advertised for sale in the month of October 1885. On the application of the plaintiff Bhim Singh, the sale was postponed till the 9th November 1885, and without any fresh sale proclamation being made it actually took place on the 10th November. The plaintiff alleged that, owing to the date of the sale not being known, no bidders attended, and as a matter of fact the only persons who did bid for the property were the defendant's karpardaz and his pleader, and the property was knocked down to the defendant Sarwan Singh for Rs. 150. It was further alleged by the plaintiff, and found as a

* Appeal from Appellate Decree No. 436 of 1888, against the decree of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 25th of November 1887, reversing the decree of Syed Abdul Aziz, Munsiff of Chatra, dated the 31st March 1887.

(1) I. L. R., 5 All., 316.

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fact by the Court of first instance, that no earnest money was deposited by the defendant, as required by s. 306 of the Code, and that he did not deposit the purchase-money in Court, and the plaintiff complained that, notwithstanding that fact, the Court passed an order on the 9th January 1886 confirming the sale, and that thereafter the defendant applied for leave to deposit the purchase-money and earnest money, which was granted.

The plaintiff contended that owing to the irregularities in publishing and conducting the sale the property had been sold at a gross under-value, and that instead of Rs. 150 it ought to have fetched Rs. 1,000, and he accordingly prayed that the sale might be set aside.

The defendant denied, amongst other things, that any irregularity had taken place or that the plaintiff had suffered any loss, and contended that the suit would not lie having regard to the provisions of ss. 311 and 312 of the Code of Civil Procedure. The other contentions raised by the defendant are not material for the purpose of this report.

Kashi Nath Pandey, at the time the plaintiff instituted this suit, also instituted a suit to have the sale set aside on similar grounds to that urged by the plaintiff, and by the consent of the parties both suits were tried together.

Amongst the issues raised in the case was one as to whether the question between the parties was not one that should have been decided in the execution proceedings, and whether the suit was not on that account barred. This was the only issue material for the purpose of the decision of the appeal by the High Court.

The Munsiff, having decided the other issues in favour of the plaintiff and Kashi Nath, and having held upon grounds which fully appear in the judgment of the High Court that the suit was not barred, set aside the sale, and ordered the defendant to pay the costs of the two suits, and declared that Kashi Nath Pandey was entitled to have the property sold in execution of his decree.

The defendant Sarwan Singh thereupon appealed against the decree in Bhim Singh's suit, and at the hearing of the appeal Bhim Singh failed to appear either in person or by pleader, though he had filed a vakalutnama.

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The Judicial Commissioner reversed the decree of the Munsiff for reasons which are fully stated in the judgment of the High Court, and dismissed the plaintiff's suit with costs.

The plaintiff Bhim Singh now preferred this second appeal.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Dwarka Nath Chuckerbutty* and Baboo *Surendra Nath Roy* for the respondent.

The following judgments were delivered by the High Court (NORRIS and BEVERLEY, JJ.):—

NORRIS, J.—The facts of this case are as follows:—

The defendant and one Kashi Nath Pandey had each obtained a money decree against the plaintiff; either one or both of the judgment-creditors attached 8 annas of mouzah Manamath, the property of the plaintiff, the judgment-debtor. After the attachment, the Court executing the decree made an order under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders. The attached property was sold and purchased by the defendant, who however did not make the deposit required by s. 306 of the Code.

The plaintiff and Kashi Nath each brought a suit to have the sale set aside. The two suits were tried together by the Munsiff, who set aside the sale.

The defendant appealed to the Judicial Commissioner against the decree setting aside the sale passed in the suit brought against him by the plaintiff. The plaintiff-respondent did not appear at the hearing of the appeal, and the Judicial Commissioner decided the case *ex parte*; he reversed the Munsiff's decree, and dismissed the suit with costs.

The issues framed by the Munsiff were applicable to both suits; the only one which it is material to consider is the first, which ran thus: "Whether the suit for setting aside the sale will lie, or ought the plaintiff to have given petition for setting aside the sale under s. 312 of the Civil Procedure Code?"

Upon this issue the Munsiff's judgment was as follows: "As regards the issue No. 1, I am of opinion that neither Kashi Nath Pandey nor Bhim Singh (the plaintiff) were precluded from

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bringing a suit, as the facts of the case show that in consequence of the earnest money and the purchase money not being paid in time, there was in fact no sale—see *Intizam Ali Khan* v. *Narain Singh* (1)." On appeal to the Judicial Commissioner only one ground of appeal apparently was argued, which in effect ran thus: "The Munsiff in deciding issue No. 1 has held that plaintiff was entitled to sue to set aside the sale of 8 annas of Manamath, but this is wrong, because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." Upon this point the Judicial Commissioner said: "It seems to me that this plea is good under cl. (*c*) of s. 244 of the Code of Civil Procedure. The question whether there had in law been a sale of Bhim Singh's property in execution of the decree held by Sarwan Singh against Bhim Singh was one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, and was consequently one to be determined by order of the Court executing the decree and not by separate suit. I set aside the Munsiff's decree in this suit, in which Bhim Singh was plaintiff and Sarwan Singh defendant, and direct that this suit be dismissed."

In special appeal two points were raised: First, that the lower Appellate Court was in error in holding that the suit would not lie, and that it was barred under clause (*c*) of s. 244 of the Civil Procedure Code; second, that no issue having been raised as to the suit being barred under clause (*c*), s. 244 of the Civil Procedure Code, and no such grounds having been taken in the petition of appeal, the lower Appellate Court ought not to have allowed the defendant to urge that point.

I do not think that there is anything in the second objection.

It is true that no issue was raised as to the suit being barred under clause (*c*) of s. 244 of the Code of Civil Procedure; but the determination of the point did not depend upon evidence; it was a pure point of law, and I think the Judicial Commissioner was justified in dealing with it if it was properly raised before him by the grounds of appeal.

It is not I think correct to say "that no such grounds were taken in the petition of appeal," for, though there is

(1) I. L. R., 5 All., 316.

no distinct reference to clause (*c*) of s. 244, there is in the petition of appeal a distinct allegation that the Munsiff was wrong in decreeing the suit, "because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." This I think meant "the question raised is one between the parties to the suit and no separate suit will lie."

The decision of the first point taken before us is not free from difficulty, and involves a careful consideration of ss. 244, 311, and 312 of the Code.

Two questions seem to arise upon a consideration of these sections with reference to the facts of this case; first, does a decree-holder cease to be "a party to the suit in which the decree was passed" if he becomes an auction-purchaser? and second, when do "questions relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof" cease to arise for determination?

Upon the first question there is a conflict of authority—see *Viraraghava Ayyangar* v. *Venkatacharyar* (1) and *Hera Lal Chatterjee* v. *Gourmoni Debi* (2).

The second question has lately been discussed by Mahmood, J., at great length in *Ramchhaibar Misr* v. *Bechu Bhagat* (3).

I have carefully considered both these questions; and had it been necessary to decide them, I should have thought it well to refer them to a Full Bench; but in the view I take of the applicability of ss. 311 and 312 to this case, I do not think it is necessary.

There remains one more question for consideration, *viz.*, does a non-compliance with the provisions of s. 306 of the Code constitute "a material irregularity in conducting the sale" which must be inquired into upon an application under s. 311, or does it furnish ground for a suit to set aside the sale? I am of opinion that such non-compliance is "a material irregularity" in conducting the sale which must be inquired into upon an application under s. 311.

It is to be observed that s. 306 deals with two persons present at a sale of immoveable property under Chapter XIX of the Code,

(1) I. L. R., 5 Mad., 217. (2) I. L. R., 13 Calc., 326.
(3) I. L. R., 7 All., 641.

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viz., "the person declared to be the purchaser" and "the officer conducting the sale." The duty of "the person declared to be the purchaser" is "to pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale."

The duties of "the officer conducting the sale" are of a two-fold character. In the first place there are the duties which are inherent to his position as an auctioneer; and, in the second place, there are the duties prescribed to him by the Code. Amongst the duties inherent to his position as an auctioneer are—(*a*) the duty of knocking down the property to the highest bidder, and (*b*) the duty of demanding the deposit of twenty-five per centum. Amongst the duties prescribed to him by the Code is that of "*forthwith* putting up the property again and selling it" if default is made in making the deposit. The word *forthwith* is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit.

This I think is the clear meaning of s. 306.

And this view is strengthened by a reference to s. 308, which regulates the procedure upon default being made in payment of the balance of the purchase-money. In that case the property is to be *re-sold;* and such re-sale cannot take place without the issue of a fresh sale-proclamation and the performance of all the other conditions precedent to a sale prescribed by the Code.

It may be that, if the Legislature had been silent as to the duty of the officer conducting the sale upon default being made in making the deposit, that the failure of the person declared to be the purchaser to make the deposit would not have been an irregularity in conducting the sale; but it seems to me impossible to conceive of a greater irregularity in the conduct of a sale than the failure of the officer conducting it to do what the Legislature has in express terms told him to do on a default being made in the making of the deposit.

I am aware that this view is opposed to that taken by the Allahabad High Court in *Intizam Ali Khan* v. *Narain Singh* (1), but I venture respectfully to think that an examination of the facts of that case will show that the judgment cannot be treated as an authority.

In that case Intizam Ali Khan, the judgment-debtor, had applied to have a sale of his property, which had been sold in execution of a decree, set aside, *inter alia*, on the ground of a non-compliance with the provisions of s. 306. The application was made and could only have been made under s. 311; and although the Court held that, "inasmuch as the indispensable conditions of the law as contained in s. 306 of the Civil Procedure Code were not fulfilled by the person declared to be the purchaser, the sale was not bad by reason of an irregularity in publishing or conducting it, but was no sale at all," it yet set aside the sale under s. 312, which only authorizes the setting aside of a sale on the ground of a material irregularity in publishing and conducting it.

In the result therefore I am of opinion that the plaintiff's suit and this appeal should be dismissed, but under the circumstances of the case without costs.

BEVERLEY, J.—I concur in holding that the present suit will not lie for the following reason :—

The ground upon which it is sought to set aside the sale is the non-compliance with the provisions of s. 306 of the Code. I concur with my learned colleague in holding that such a non-compliance, if substantiated, would amount to an irregularity in conducting the sale such as is referred to in s. 311. It should, therefore, in my opinion have been made the subject of objection under that section before the sale was confirmed. Sections 311 and 312 provide a special procedure, open to both the decree-holder and the judgment-debtor, for the determination of disputes arising out of irregularities in publishing and conducting sales, and I am of opinion that it was the intention of the Legislature that all such disputes should be determined under the provisions of those sections in the course of the execution

(1) I. L. R., 5 All., 316.

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proceedings, and not by way of a regular suit after the sale has been confirmed. Section 312 distinctly bars a suit to set aside, on the ground of irregularity, an order made under that section, and that includes an order confirming the sale, even when no application has been made under s. 311 to have it set aside. That being so, I am of opinion that the present suit cannot be maintained, and I agree in dismissing the appeal without costs.

H. T. H. *Appeal dismissed.*

PRIVY COUNCIL.

P. C.* 1888. *March* 8 & 9, *April* 21.

HARI SARAN MOITRA (PETITIONER) *v.* BHUBANESWARI DEBI (FOR HERSELF AND AS GUARDIAN OF JOTINDRAMOHUN LAHIRI, A MINOR) AND ANOTHER (OBJECTORS).

[On appeal from the High Court at Calcutta.]

Execution of decree—Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon devested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey* v. *Shamasoondery Debia* (1) referred to, and applied in this case.

* *Present :* LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

(1) 3 Moore's I. A., 229.

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Held, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor.

Sureshchunder Wum Chowdhry v. *Jugutchunder Deb* (1) approved.

CONSOLIDATED appeals from two decrees (June, 9th and 10th 1884) of the High Court, reversing an order made in execution, and a decree for mesne profits (10th January 1882), by the Subordinate Judge of Rungpore.

The principal question on these appeals related to the enforcement of a decree against a minor, as a consequence of his adoption by the judgment-debtor, a widow, against whom, as representing the deceased manager of family estate, a decree had been obtained by another member of the family for a share. Whether that decree was enforcible against, and mesne profits were claimable from, the adopted minor, through his adoptive mother as his guardian, the above decree having been made without his having been formally made a party thereto, was the first question. Other points were in dispute, *viz.*, as to what property was to be included in the execution; as to the relative liability of the judgment-debtors among themselves; and as to whether their liability was joint, or several.

The first of these appeals arose out of a petition by the present appellant, as decree-holder, for execution of a decree (22nd December 1874), made in his favor by the High Court in a suit brought in 1870 against Bhubaneswari Debi, Nilcomul Lahiri, and Kanaktara Debi; and affirmed by an order (20th November 1880) of Her Majesty in Council. This decree declared his mother, Umasoonderi, whom he now represented, to be entitled on partition to the possession of a share in the joint family estate. The other appeal was from a decree (10th January 1882) in a suit brought by the present appellant for mesne profits of the share in lands to which the decree of 1874 had established his title. Execution was sought, and the suit for mesne profits was brought, against the present respondents, Bhubaneswari Debi, for herself, and as guardian of the minor Jotindramohun Lahiri, and Nilcomul Lahiri.

(1) I. L. R., 14 Calc., 204.

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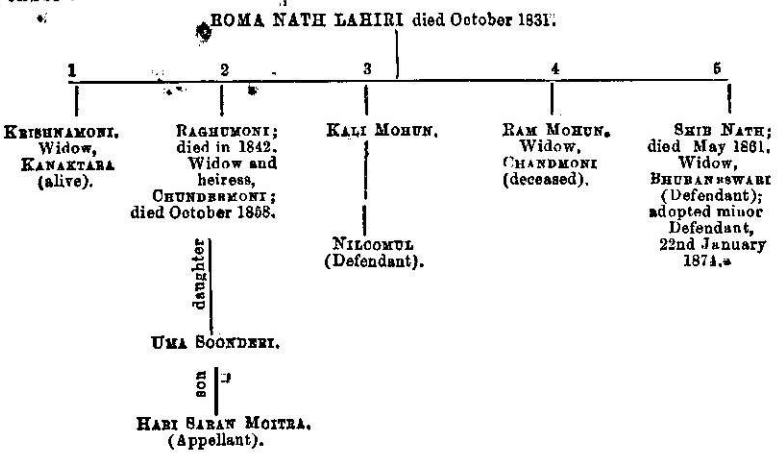
The relationship of the parties appears in the following table :—



In the suit brought in 1870 Umasoonderi claimed to establish her title, as heiress of her father, Raghumoni, to a one-fifth share of the estate which had been Romanath's, together with the accretions thereto made by Shibnath, as manager of the family till his death, and she asked to have set aside as against her a partition alleged by the defendants to have been made by Romanath on October 26th, by which he purported to give a 3-anna share of his estate to his eldest son, Krishnamoni, and shares of 2½ annas to his other sons, and to reserve the remaining 3 annas for himself, and also to set aside a deed of sale, dated 2nd March 1856, by which Chundermoni, the plaintiff's mother, purported to sell to Shibnath a one-fifth part of her 2½ anna share.

The details of the property, claimed as being subject to partition, were given in two schedules, the first of which comprised inherited land belonging to the family, and the second stated the property acquired by the family whilst joint.

The decree of the Subordinate Judge of Rungpore (13th December 1872) was in favor of the plaintiff as to part of her claim; and it was, in the main, affirmed by the High Court (24th December 1874), the decree being in the terms set forth in their Lordships' judgment below.

The adoption of Jotindramohun, meantime, and pending the proceedings by Bhubaneswari in appeal, took place (under an

anumati patro contained in the will of Shib Nath) on 22nd January 1874 (1). But Jotindramohun was not made a party to the appeal by any proceeding before the Court. And from the decree of the High Court, Bhubaneswari alone appealed to Her Majesty in Council, whose order (20th November 1880) followed the judgment reported in *Bhubaneswari Debi* v. *Hari Saran Moitra* (2).

Application for execution was made by the present applicant, whose name had been substituted for that of his mother, by that time deceased, on the 9th April 1881.

This application was against "Bhubaneswari for herself, and as guardian on behalf of the minor Jotindramohun Lahiri," and also against Nilcomul to recover possession of the immoveable properties mentioned in the plaint, and in the decree, as also of certain moveable properties, or their value. As to the last, the moveables, there was no dispute on this appeal.

The suit for mesne profits was brought on the 12th April 1881 against the same parties as defendants, so as to include Bhubaneswari in her individual capacity, and the minor through her as guardian, together with Nilcomul.

Bhubaneswari objected that she was not liable in the execution proceedings, having, before the decree of 1874, adopted the minor who, on the advice of Nilcomul, was not made a party in the appeal of the principal suit; and she defended the suit for mesne profits on similar grounds, throwing the liability on to Nilcomul. In neither of these proceedings, not in the execution nor in the suit, could the minor be held liable, because he had not been a party to the decree of 1874. On the merits, Bhubaneswari represented that Nilcomul was entitled, on the whole, to no more than a four annas thirteen gundas share, while she herself was entitled to an equal share, with some addition; and she alleged that Nilcomul had admitted, in the previous litigation, possession of six annas ten gundas, showing thereby that he had, without title, an excess of one anna seventeen gundas.

(1) See *Bhubaneswari Debi* v. *Nilcomul Lahiri*, I. L. R., 12 Calc., 18, and *Sotishchunder Lahiri* v. *Nilcomul Lahiri*, I. L. R., 11 Calc., 45.

(2) I. L. R., 6 Calc., 720.

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Nilcomul, by his objections to the execution and in his defence to the suit for mesne profits, insisted that he was in possession of only his rightful share, and that the decree-holder should look only to Bhubaneswari, who was in possession of a five annas share; whereas, at the outside, she had only a right to her husband's quota of three annas and four gundas, together with what the latter might have obtained from Kanaktara's share. This objector further alleged that, if he should be held at all liable, such liability would be limited to the two gundas share, held by him in excess of the six annas eight gundas share, to which, under the decree itself, he was entitled.

One Rudrachunder Roy also filed objections on behalf of the minor, founded, like those taken by Bhubaneswari on his behalf, on his not having been a party to the decree of 1874.

The Subordinate Judge of Rungpore, Bhugwan Chunder Chukerbati, on the question of the minor's liability through his guardian, both in the execution, and in the suit for mesne profits, was of opinion that Bhubaneswari having acted for the minor's interests, he was bound by the result of her appeals. His judgment on this point was as follows: "In fact, the appeals were prosecuted and defended by her with the *bonâ fide* intention that her husband's real rights had been interfered with. On that understanding she went up even to the Privy Council, without alluding to the fact of her having adopted a son. There is no reliable evidence that the plaintiff knew of the adoption having been validly effected. I am inclined, therefore, to follow the rulings in *Ramkishore Chuckerbutty* v. *Kally Kanto Chuckerbutty* (1) and *Jotendro Mohun Tagore* v. *Jogul Kishore* (2), and to hold that the minor Jotindramohun will be liable for the wasilat, which tantamounts in substance to the effect that the estate of his adoptive father will be virtually liable, inasmuch as it was for his interest that the suit was defended, and the appeal carried up to the highest tribunal; and so he cannot evade the consequences of the act which was done with a motive to render his future good, though the result turned out otherwise than was anticipated."

(1) I. L. R., 6 Calc., 479; 8 C. L. R., 1.
(2) I. L. R., 7 Calc., 357; 9 C. L. R., 57.

The Subordinate Judge was of opinion, also, that the liability of the defendants was several, as they were severally in possession, and he awarded to the decree-holder "possession and wasilat of his decretal share from each of them exclusively and separately."

Finding that Bhubaneswari held, for herself, and as guardian of the minor, five annas, that Nilcomul had six and a half annas and Kanaktara two and a half annas, while the decree-holder had two annas only, the Subordinate Judge decreed that "possession be given to the decree-holder of his remaining one anna and four gundas in the following proportion, *viz.*, thirteen and two-third gundas from Bhubaneswari, representing the minor adopted son, and ten and one-third gundas from Nilcomul. As respects properties which each of the judgment-debtors holds in his exclusive possession, he or she should make over to the decree-holder the full decretal share, which is three annas four gundas."

The Subordinate Judge also decreed to this appellant interest upon wasilat to the end of each year, and describing the properties or plots of land for which wasilat was due, and in whose possession they respectively were, he made a decree for payment to the plaintiff by Bhubaneswari, as guardian of the minor Jotindramohun, for mesne profits with interest, the sum of Rs. 3,297, and by Nilcomul, the sum of Rs. 2,394; adding interest to the date of payment.

In a separate judgment in the execution case, the Subordinate Judge decided against this appellant as to the building being included in the execution; being of opinion that the High Court, in awarding, to the then plaintiff, a share "of all the property" named in the two schedules, intended to include only the landed property therein, and not the buildings and moveables.

Rudrachunder Roy was not recognized by the Subordinate Judge as a party to the proceedings in the character of next friend of the minor, the Judge being of opinion that in the execution proceedings he should not be allowed to appear on behalf of the minor, whose interests the adoptive mother could sufficiently protect. Rudrachunder, however, filed a petition of appeal to the High Court, in the execution case, on behalf of the minor. Bhubaneswari also appealed, taking the same objections as were

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taken by Rudrachunder to the execution against the minor. She appealed also on her own behalf. Nilcomul Lahiri also appealed against the order in execution; and the petitioner, Hari Saran Moitra, filed objections in the form of a cross-appeal, from the order as to the buildings and the moveables. Against the decree for mesne profits, both Bhubaneswari, for herself and as guardian of the minor, and Nilcomul Lahiri appealed.

A Division Bench of the High Court (McDONELL and FIELD, JJ.) reversed the decision of the first Court on the question of the minor's liability upon execution of the decree of 1874, and in the suit for mesne profits. They held that making a person's guardian defendant to a suit was not the same thing as making that person himself a party, and that this was not affected by the fact of his being a minor. The procedure of the Code had not been followed, and it contemplated a minor being made a party to the suit in his own name, directing that the Court, on being satisfied of the fact of his minority, should appoint a proper person to conduct his defence. They added: "In this case the plaintiff did not make any application to the Court to have a guardian *ad litem* appointed for the minor. There was an application made by a third person, who urged that he, and not Bhubaneswari, ought to be appointed guardian of the minor; but this was rejected, and the Subordinate Judge thought that Bhubaneswari was the minor's proper guardian. The Subordinate Judge was thus aware of the fact of Jotindramohun's minority, and being so aware, it was his duty to follow the procedure provided by s. 456. This, however, he did not do. Bhubaneswari then objected, and still objects, to being made a guardian *ad litem*. No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to become bound by the decree."

In regard to Bhubaneswari's individual responsibility under the decree, the Judges said: "But then it is contended that Bhubaneswari Debi is bound. She was made a defendant in a double capacity, for self and as guardian on behalf of the minor. In her personal capacity no decree has been passed against her. ....If the decree

against Bhubaneswari Debi, in the form in which it has been made, that is, in her capacity as agent or manager, is allowed to stand, it is clear that the Court would have no authority to enforce it as against the minor, who was not a party to the suit, and who cannot be affected by this decree. We think, therefore, that the decree as made against Bhubaneswari Debi, guardian or manager of the minor, cannot be allowed to stand."

The Judges held that the Subordinate Judge was wrong in dealing with the decree of 1874, as if it had been a separate decree against each of the two judgment-debtors. In their opinion it was a joint decree and should be so executed as to give this appellant possession of an undivided share of three annas four gundas in every plot of the immoveable property.

As to the buildings, the decree-holder had, the Judges found, taken no steps either under the Code (s. 137) to have the original plaint made part of the execution record, or to file a certified copy of the two schedules. They, therefore, left this matter for the Subordinate Judge to see that a certified copy of the schedules annexed to the plaint was filed.

Dealing with Nilcomul's appeal, the Judges held that he was rightly entitled to a six annas eight gundas share, being three annas four gundas inherited by him from his father, and a similar share, which fell to him on the death of Chandmoni; so that, being in possession of six annas ten gundas, he held only two gundas over and above his proper share. Their judgment on this point was the following: "As regards these two gundas, the possession of Nilcomul being admitted, there must be a decree for mesne profits, and these mesne profits will be calculated upon the figures which the Subordinate Judge has taken in his decree. The result will be, that the appeal of Bhubaneswari will be decreed, and so far as she is concerned, the decree of the lower Court will be set aside. There will be a declaration that the minor Jotindramohun Lahiri has not been properly made a party to these proceedings and is in no way affected by the result. As regards Nilcomul, there will be a decree for mesne profits for four years, 1284 to 1287, upon two gundas of the property only."

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The decree on Nilcomul's appeal was that, in lieu of the award to the plaintiff of Rs. 5,692, as mesne profits, the sum of Rs. 475 was payable only in respect of the two gundas share. In regard to the possession to be given to the decree-holder, under the execution order, the order of the lower Court was varied by awarding to the decree-holder possession, as against both Bhubaneswari and Nilcomul jointly of an undivided three annas and four gundas share in every plot of land in dispute, giving to the decree-holder a one anna four gundas share in the plots in which he, or his mother, had possession of a two annas share before suit, and a three annas four gundas share of those plots in which he, or she, had no previous possession.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellant, argued that the Appellate Court should have held that the minor, having become to all intents a party to the decree of 1874, upon the devolution of estate upon him, consequent on his adoption, the decree was enforcible against him; and that he was also liable in the suit for mesne profits. Whether Bhubaneswari sufficiently represented the minor as his guardian had been a question for the Subordinate Court before allowing the execution to proceed. The Court had allowed it to proceed, and thus the question had been disposed of. If any irregularity had taken place in the matter, it could not now be made a ground for reversing the order of the Court executing the decree, inasmuch as no material injury had been, or could be, shown to have resulted. At the time when the proceedings in appeal were taken, and the decree was passed, s. 11 of Act XXIII of 1861, amending Act VIII of 1859, was in force. The minor's liability, through his guardian, was not affected, either as regarded the proceedings against him in execution, or the suit for mesne profits; there being nothing to prevent that liability from devolving upon him, represented as he was by his guardian, along with the interest which he took in the estate, which was bound by the decree of 1874. The minor was substituted for Bhubaneswari from whom both interest and liability passed, on the adoption, in her capacity as representing the estate, to her as representing the minor as his guardian. The parties who for the time being were entitled to

the estate were those against whom the Subordinate Judge had rightly ordered execution, and the liability for mesne profits rested on the decree. The minor had not been precluded from taking any real objection if he had had one to maintain.

[SIR R. COUCH, in reference to the guardianship of the mother, referred to Sir T. Strange's Hindu Law, vol. 2, appendix to Chap. VIII, and vol. 1, cap. 3, para. 4.]

Any merely formal defect had been cured by the action of the first Court and the proceedings taken. Accordingly, both as to the execution by delivery of possession to the appellant, and as to the award of mesne profits, the decree of the High Court was erroneous and should be reversed. On the merits also, the appellant was entitled to the possession of the shares as ordered in the Court of first instance against the defendants under the decree of 1874.

[In reference to the question of guardianship, SIR B. PEACOCK referred to *Doorgapersad* v. *Keshopersad Singh* (1).]

The following cases were referred to in the argument for the appellant: *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (2); *Manager of Raj Dharbanga* v. *Coomar Ramapat Singh* (3); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (4); *Hunoomanpersad Panday* v. *Munraj Konwaree* (5); *Jogulkishore* v. *Jotendromohun Tagore* (6); *Jairam Rajah* v. *Joma Kondia* (7); *Kishen Singh* v. *Mareshwar* (8); *Komul Chunder Sen* v. *Surbessur Dass Gooptoo* (9); *Jogi Singh* v. *Kunj Behari Singh* (10); *Alim Baksh Fakir* v. *Jhalo Bibi* (11); *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (12).

(1) L. R., 9 I. A., 27; I. L. R., 8 Calc., 656.
(2) Marsh, 614.
(3) 14 Moore's I. A., 605.
(4) L. R., 6 I. A., 233.
(5) 6 Moore's I. A., 393.
(6) L. R., 11 I. A., 166; I. L. R., 10 Calc., 983.
(7) I. L. R., 11 Bom., 361.
(8) I. L. R., 7 Bom., 91.
(9) 21 W. R., 298.
(10) I. L. R., 11 Calc., 509.
(11) I L. R., 12 Calc., 48.
(12) I. L. R., 14 Calc., 429.

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Mr. *R. V. Doyne*, for the respondent Nilcomul Lahiri, argued that the appellant's rights under the decree of 1874 were fully satisfied by the terms of the decrees of the High Court. Against him the appellant had not made out any further claim than to receive the three annas four gundas share decreed in 1874; and in finding that Nilcomul had obtained possession of no more than he was entitled to, with the small exception of two gundas, as to which the decree for mesne profits had been allowed to remain, the High Court had come to a correct decision.

Mr. *Lawrence Biale*, for the respondents Bhubaneswari, and the minor adopted son Jotindramohun, argued that the decision of the High Court was correct. It could not be held that the minor had been constructively a party to the decree of 1874, and in consequence of his not having been represented by a duly constituted guardian *ad litem*, at the time when the proceedings took place, resulting in the decree of 1874, the decree could not be held to be binding upon him. The Minors' Act, XL of 1858, in s. 3, required that a minor in a suit should be represented by his duly authorized guardian, and the procedure was prescribed accordingly. This was in accordance with general principles, and that Bhubaneswari, not being duly appointed, could yet be the guardian of Jotindramohun so as to represent him in the suit had not been shown. The main point was that all that had occurred before the decree of 1874 had been insufficient to bring the minor before the Court, or his name on to the record; and that, without having been properly represented and heard by his guardian, he could not be treated as one of the judgment-debtors, who were parties to that decree, which must receive effect, as it stood, against those who were parties in it. The High Court had correctly refused to allow execution of that decree to proceed on this application against Bhubaneswari in her personal capacity; for in that character she had ceased upon the adoption to be responsible; while, at the same time, the adopted son could not be held liable through her, inasmuch as she had not been appointed his guardian *ad litem*; and there had been no formal appointment made, such as alone could empower her to act in defending the minor's interest. This was a point on which an order was required at the proper stage, when application

should have been made. And it was not apparent that Bhubaneswari was in a position to represent the minor's interests as well as her own. It was, at all events, against the minor's interest that he should be taken to have been made a party, without the necessary and proper steps having been taken to make him one, and to give him an opportunity of being heard. This was the irregularity, and a most material one. In the case of a minor, the strict rule as to the joinder of parties should have been applied, and it could not be said that the omission was an immaterial one. True it was that the enforcement of decrees against persons upon whom interests had devolved, after such decrees had been passed, was a proceeding permitted in some well ascertained cases of successive liability. This appeared from the cases decided under Act VIII of 1859, chap. IV, ss. 109-206. See the note, collecting the cases, in Mr. W. Macpherson's edition of 1871, of the Code of Procedure. But there was no case in which a minor, without having been represented by a duly appointed guardian, had been held to be a party to a decree only by reason of his adoption. The High Court might have said that the minor was not liable in either the suit for mesne profits, or in the execution proceedings, as the same considerations applied in regard to the minor's liability upon either the one or the other; but the result at which the Court had arrived was right. He referred to *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (1); *Bissessur Lal Sahoo* v. *Luchmessur Singh* (2).

[SIR R. COUCH referred to *Dhurm Dass Pandey* v. *Shamasoondery Debia* (3).]

The argument was that although, as in that case, the minor could receive a benefit, and an omission would not deprive him of an advantage, yet that, before his estate could suffer detriment, he must be represented and heard.

On the merits, as against Bhubaneswari and the minor, the actual rights of the appellant were, it was contended, fully satisfied by the decree of the High Court. In respect of mesne profits, Nilcomul, as in effect had been decided, should alone be held responsible.

(1) Marsh, 614. (2) L. R., 6 I. A., 233.
(3) 3 Moore's I. A., 299.

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Mr. *J. D. Mayne* replied, pointing out that in the cases already cited in the argument for the appellant, the defendants, against whom execution was allowed, were not parties to the decrees, which, however, were held to bind the property in their hands. So here the property was bound by the decree of 1874. The appellant wanted nothing to be added to the decree to make it effective in his favor; the liability of the adopted son being correlative with his right to succeed, the latter right being shown on his taking the benefit of a decree in his guardian's favor in the case of *Dhurm Dass Pandey* v. *Shamasoondery Debia* (1).

Their Lordships' judgment was delivered, on a subsequent day (April 21st), by

SIR R. COUCH.—In 1870 Uma Soonderi Debi, the mother of the appellant, and daughter and heiress of Raghumoni, who was one of five brothers, sons of Roma Nath Lahiri, forming a joint Hindu family, brought a suit against Bhubaneswari Debi, the widow of Shib Nath, one of the brothers, who had managed the family property, Nilcomul, the son of Kali Mohun, another brother, and Kanaktara, the widow of Krishnamoni, another brother. These were the only members of the family who were then alive, Ram Mohun, the fifth brother, having died without issue, leaving a widow, who was then also dead. In the suit Uma Soonderi claimed to recover possession of her father's share of the family property, which was said in the plaint to consist of land mentioned in schedules Nos. 1 and 2, and pucca buildings and personal properties. Schedule No. 1 contained the lands which the brothers had inherited from their father, and No. 2 the lands which were said to have been acquired whilst the members of the famil[illegible] mensality. On the 13th December 1872 the of Rungpore made a decree in favour of Um of part of the share which she had claimed. T wari, Uma Soonderi, and Nilcomul separa High Court, which, on the 22nd December 1 in the following terms: "It is ordered and d of the lower Court be varied, and in lieu thereo and declared that the plaintiff is entitled gundas share (the share claimed) of all

(1) 3 Moore's I. A. 299.

is named and described in the two schedules appended to the plaint." And Uma Soonderi having before the suit been put in possession of 2 annas of the property named and described in the first schedule, it was ordered and decreed that she should recover from the defendants possession of the remaining 1 anna and 4 gundas, and possession of 3 annas 4 gundas of the property named and described in the second schedule. Thereupon Bhubaneswari appealed to Her Majesty in Council, who, by an order in Council, made on the 20th day of November 1880, affirmed the decree of the High Court. Whilst the appeals were pending in the High Court, Bhubaneswari adopted a son, Jotindramohun Lahiri, but she continued to prosecute her appeal in that Court, and appealed to Her Majesty in Council in her own name, taking no notice of the adoption. On the 9th April 1881, Uma Soonderi having died, the appellant as her heir made an application to the Court of the Subordinate Judge for execution of the decree. It stated that the enforcement of the decree was sought against Bhubaneswari for self and as guardian on behalf of the minor Jotindramohun Lahiri, and against Nilcomul Lahiri. Execution was not sought against Kanaktara, who was said in the judgment of the High Court to have made no defence to the suit. The reason of this may be that she was not in possession of more than her husband's share. On the 12th of April 1881 the appellant brought a suit in the same Court for mesne profits, naming as the defendants Bhubaneswari Debi, for self and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge, on the 10th January 1882, gave judgment in both cases, referring in one judgment to the other where the question appeared to him to be the same. The judgments will be more conveniently stated hereafter. In the execution case Jotindramohun, by his next friend Rudrachunder Roy, appealed to the High Court. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shown to have obtained any authority to act as next friend of the minor, and is said to have been a servant of Bhubaneswari. She also appealed, taking the same objections as regards the minor as were taken by the assumed next friend. Nilcomul also appealed, and Hari Saran

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Moitra, the present appellant, filed objections by way of cross-appeal. In the suit for mesne profits both Bhubaneswari and Nilcomul separately appealed.

On the 9th of June 1884 the High Court gave judgment in the suit for mesne profits, and on the 10th in the execution case, and the present appeal is from the orders or decrees made upon those judgments.

In the execution case there are three questions: (1) whether execution can be had against the minor personally or against Bhubaneswari; (2) whether the pucca buildings and moveables are to be included in the execution; (3) whether possession in execution was to be given against the parties jointly or severally. Upon the first of these questions the Subordinate Judge said :—

"Whether the execution in this case should proceed against the minor personally or against his adoptive mother is a point which has been equally raised and decided in the decree-holder's suit for wasilat, No. 26 of 1881. The question being similar the same judgment should govern them both. I hold, therefore, under the decision I have this day delivered in the trial of issue 7 in the above suit for wasilat, that the execution should be carried out against the minor, and hence against the estate left by his adoptive father. Bhubaneswari, for herself, cannot be made personally liable when the assets of her husband are available at hand to fulfil the conditions of the decree. Then, as apparent from the record of the suit No. 26, Bhubaneswari was a defendant in the original suit in the capacity of a representative and in possession of her husband's estate. That possession is still with her, though, since the adoption, it has been converted to one on behalf of her minor son. The minor is also under her guardianship and protection. Bhubaneswari is, therefore, the proper person to represent the minor, and I do not think it equitable that Rudrachunder Roy, almost a stranger, should be allowed to stand on behalf of the minor when his connection is far remoter than that of Bhubaneswari, who protects the minor, and is his nearest kindred as the adoptive mother."

On the same question the High Court said :—

"The present appeal arises out of proceedings taken to execute the decree in the title suit passed by the High Court, and confirmed on appeal by the Privy Council. It is contended that that decree cannot be executed against the minor Jotindramohun Lahiri, because he was not a party to it, and those steps which, according to law, might have been taken to make him a party were not taken. Section 372 of the Code of Civil Procedure provides for making the assignee or other transferee of the interest of a defendant a party to the suit when the assignment or transfer has been made during the pendency of the suit. No action was taken under this section. It has been

urged that the devolution of the defendant's interest upon the adopted son by reason of the adoption was not known to the decree-holder, and that therefore he could not take the necessary steps to make the minor a defendant. This may be so, but upon this point we pronounce no opinion. We further pronounce no opinion upon the question whether the minor is bound by the decree in the title suit. All we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record."

Their Lordships find a difficulty in understanding what the High Court meant by this judgment. The Code of Civil Procedure referred to must be Act X of 1877, as s. 372 of the previous Code relates to special appeals. Act X of 1877 came into force on the 1st October 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under s. 372, it appears to their Lordships that the question whether the adoption was or was not known to the decree-holder was a matter upon which an opinion should have been pronounced. What follows is still more difficult to be understood. The Court say: "We pronounce further no opinion upon the question whether the minor is bound by the decree in the suit; all we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record." In the suit for mesne profits, where Bhubaneswari was sued as widow for self and as guardian on behalf of the minor, they say: "Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. . . . A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name," and decide that the minor was not bound by the decree. Their Lordships are unable to see why the High Court, having said in the suit for mesne profits that the minor was not bound by the decree, declined on the next day to pronounce an opinion upon the question.

It was just as necessary to decide the question in the execution proceedings as in the suit for mesne profits. The decree in the original suit was sought to be enforced against Bhubaneswari personally and as guardian of the minor. So far as he was

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concerned the sole question was whether the decree bound him. If it did, execution was rightfully sought against him through his guardian, and it was no answer that his name was not on the record.

The decree of the Subordinate Judge, made as it was before the adoption, when Bhubaneswari was the owner of the estate and fully represented it, was binding on the minor. It took away part of the estate of which Shib Nath was in possession when he died. After the adoption it was for the interest of the minor that Bhubaneswari's appeal should be prosecuted, and the appeals of Uma Soonderi and Nilcomul defended. Bhubaneswari's estate had been devested, and she could obtain nothing, but as the adoptive mother and guardian of the minor it would be right for her to continue to defend the suit. There has been no suggestion that it was improperly defended, or that the appeal to Her Majesty in Council was not proper. In his judgment in the suit for mesne profits the Subordinate Judge says: "In fact, the appeals were prosecuted and defended by her with the *bonâ fide* intention that her husband's real rights had been interfered with." If her appeal had been successful, Bhubaneswari, as the guardian of the minor, would have been kept in possession of the whole of what Shib Nath died possessed of, and would have been accountable to the minor for it. In *Dhurm Das Pandey* v. *Shama Soondery Debia* (1) a Hindu widow brought a suit for partition, and to be put in possession of her husband's share in the joint undivided estate. Pending the suit she adopted a son, and notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put in possession. Their Lordships said (page 243): "All the facts being stated, it is assumed as matter of law that after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then, as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered for his benefit, and that she is put in possession as trustee for him." Their Lordships are of opinion that this principle is applicable in the present case, that the minor is bound by the decree in

(1) 3 Moore's I. A., 229.

the title suit, and the High Court was in error in allowing his appeal in the execution case, which they have done by their decree in the appeal No. 97.

The next question is as to the pucca buildings and moveables. The decree of the High Court in the original suit was: "It is ordered and decreed that the decree of the lower Court be varied, and in lieu thereof it is hereby decreed and declared that the plaintiff is entitled to 3 annas and 4 gundas share of all the property which is named and described in the two schedules appended to the plaint." The moveables were in a separate inventory, and it is now admitted that execution cannot be had in respect of them. As to the pucca buildings the Subordinate Judge said: "I consider it to have been purely the intention of the High Court that, in awarding a decree in favour of the plaintiff for a 3 anna 4 gundas share of all the property which is named in the two schedules, only the landed property was meant, and decided upon without relevancy to the buildings or moveables." But as it had been contended that the decree literally included the buildings, he thought it equitable that the decree should be returned to the decree-holder for amendment in the proper Court, and then the execution be revised in conformity with the judgment. The judgment of the High Court upon which the decree was drawn up used exactly the same words, and so there could be no amendment. The effect, therefore, was that execution in respect of the pucca buildings was refused.

The High Court dealt with the question in a rather singular way. They said that, in order to discover what the property was, they must refer to the two schedules appended to the plaint, and as the decree-holder had taken no steps to have the original plaint made a part of the execution record, or to file a certified copy of the two schedules, they were unable to discover from the record whether the pucca buildings and the moveable property were or were not included in the schedules annexed to the plaint. The Subordinate Judge had inserted in his decree two schedules which were described as schedules of immoveable property under claim, and had awarded a $2\frac{1}{2}$ annas share of the landed properties stated in those schedules. The High

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Court varied the decree by giving a larger share. It was obvious that they intended this to be a share of the same property, *viz.*, what was described in the decree of the Subordinate Judge as under claim, that is, claimed in the plaint. If proof of the contents of the schedules to the plaint was necessary, the Court might have postponed giving judgment, and allowed a certified copy to be filed. Their Lordships are of opinion that such proof was not necessary, and that the cross-appeal upon this question, which was No. 125, ought to have been allowed, and the order appealed from varied by including the pucca buildings.

As to the third question, namely, whether possession in execution was to be given against the parties jointly or severally, which was raised in the appeal No. 126, the High Court decided that decree ought to be executed by giving the decree-holder as against Bhubaneswari and Nilcomul a 1 anna 4 gundas share in the plots of which he already had possession of 2 annas, and 3 annas 4 gundas of the plots in which he had no possession. They accordingly ordered, in the appeals Nos. 125 and 126, that the objections or cross-appeal should be disallowed, and, except as aforesaid, the order of the Subordinate Judge should be varied by awarding to the decree-holder possession jointly as against Bhubaneswari and Nilcomul of an undivided share of 3 annas 4 gundas in every plot of the land in dispute.

The learned Counsel for the appellant has not disputed that the possession is rightly awarded jointly against the parties liable to have it recovered from them.

So far, the decree of the High Court may stand; but their Lordships being of opinion, as has been stated, that the minor is bound by the decree, and that execution may be had against him, the decree in the appeal No. 97 will be reversed, and the appeal dismissed with costs, and the decree in Nos. 125 and 126 will be varied by ordering that appeal No. 125 should be dismissed with costs, and by allowing the plaintiff's objections or cross-appeal so far as regards the pucca buildings, and by including them in the award of possession. And their Lordships will humbly advise Her Majesty accordingly.

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The action for mesne profits has now to be considered. In this the questions are: (1), whether the liability was joint or several; (2), whether Jotindra Mohun was liable. In the title of the plaint the defendants are stated to be Bhubaneswari Debi, widow of the late Shib Nath Lahiri, for self, and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge decided that the liability of the defendants should be separately assessed, and looking at the possession of the joint ancestral property, which he said had been fully admitted in the suit by all the parties concerned in it, he found that out of the 1 anna 4 gundas share in the joint ancestral property which had been decreed in favour of the plaintiff, 13⅔ gundas share was in possession of Bhubaneswari, and 10⅓ gundas share in the possession of Nilcomul. Accordingly he decided that with respect to the land held in common, the mesne profits were to be calculated and separately charged in these proportions. As to the second question, he said that the appeals to the High Court and Her Majesty in Council were prosecuted by Bhubaneswari "with the *bond fide* intention that her husband's real rights had been interfered with;" and inasmuch as it was for the interest of Jotindramohun that the suit was defended and the suit carried up to the highest tribunal, he held him to be liable for the mesne profits. The decree awarded for mesne profits within the period allowed by the law of limitation a total sum of Rs. 5,692-7-2 pies, and ordered that the plaintiff should recover from Bhubaneswari as guardian on behalf of the minor Jotindramohun Rs. 3,297-10-2 pies, and from Nilcomul Rs. 2,394-13 annas. Both Nilcomul and Bhubaneswari appealed to the High Court,—the former on the ground that the plaintiff was not entitled to recover from him the 10⅓ gundas share, and at the most he was not liable to make good more than 2 gundas, and Bhubaneswari on the ground that Jotindramohun was not properly made a party to the suit, and should not have been held liable.

The High Court in their judgment deal first with this question. They say: "In the plaint the minor is not made a defendant. The defendants are Nilcomul Lahiri and Bhubaneswari Debi as widow of the late Shib Nath Lahiri, and as guardian on behalf of the

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minor Jotindramohun Lahiri. Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. There is no excuse for ignorance as to the proper procedure in respect of minors, seeing that the provisions contained in the present Code of Civil Procedure became law nearly seven years ago, in 1877. A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name." And after referring to the provisions for the appointment of a guardian *ad litem* they say: "No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to be bound by the decree."

In *Sureshchunder Mum Chowdhry* v. *Jugut Chunder Deb* (1) a plaint in a suit described one of the defendants thus: "N. C., guardian, on behalf of her own minor son, S. C.," and it was held by a Full Bench of the High Court at Calcutta that, it appearing that the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, it could not, without proof of prejudice, invalidate a decree against him in the suit; also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit when it appeared on the face of the proceedings that the Court had sanctioned the appointment. Their Lordships are satisfied that the suit for mesne profits was substantially brought against the minor. The 7th issue decided by the Subordinate Judge contained the question whether he could be made liable when he was not a party in the former suit. And the grounds of appeal in Bhubaneswari's appeal to the High Court show that she appealed on his behalf as well as her own. It is also apparent that the Subordinate Judge treated her as appearing in the suit as guardian, and sanctioned it. This is very clear in his judgment in the execution case before quoted. He says: "The minor is also under her guardianship and protection; Bhubaneswari is therefore the proper person to represent the minor." Their Lordships, therefore, are of opinion that the High Court was in error in decreeing that the suit

(1) I. L. R., 14 Calc., 204.

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should be dismissed as against Jotindramohun, and declaring that he was not a party to it and was not bound by the result of the proceedings.

In the appeal by Nilcomul, the High Court said that the Subordinate Judge did not find that Nilcomul was in possession of any portion of the property in excess of the share to which he was himself legally entitled, but that he had been in possession of 6 annas 10 gundas had been practically admitted before them at the hearing of the appeal, while a title to more than 6 annas 8 gundas was not asserted. It was also admitted in his written statement. They thought, therefore, that, except as regards the 2 gundas, the plaintiff had not proved that Nilcomul was, during the years for which mesne profits were claimed, in possession of any portion of the property, the title to which was concluded by the decision in 1880. They therefore held that, as regards the 2 gundas, there must be a decree for mesne profits calculated upon the figures which the Subordinate Judge had taken in his decree. Accordingly they varied his decree by decreeing that Nilcomul should pay, instead of the sum awarded by that decree, the sum of Rs. 475 only, as mesne profits, with interest thereon from the 10th of January 1882, the date of the decree of the lower Court. The learned Counsel for the appellant did not object to this decision, nor did the learned Counsel who appeared for Bhubaneswari and the minor object to it. Further, it is not disputed that the aggregate of the portions of the property of which Nilcomul and Bhubaneswari have been in possession during the years for which mesne profits have been awarded shows an excess over their lawful shares at least equal to the share of which the plaintiff has been wrongfully deprived. Consequently, if Nilcomul held only 2 gundas, Jotindramohun would be liable for the mesne profits of the remainder, and the plaintiff would be entitled to recover the balance of the total sum of Rs. 5,692-7-2 pies awarded for mesne profits from his estate. This would be Rs. 5,217-7-2. Therefore the decree of the High Court in the appeal by Bhubaneswari (appeal No. 130 of 1882) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that the plaintiff do recover from

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Bhubaneswari as guardian on behalf of the minor, Jotindramohun, the sum of Rs. 5,217-7-2, with interest at 6 per cent. per annum from the 10th January 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court in appeal No. 121 of 1882, so far as it relates to payment by Nilcomul Lahiri and to costs, will be affirmed. Their Lordships will humbly advise Her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the appellant to pay the costs of the respondent Nilcomul, and that the appellant's costs, but not including what he is ordered to pay to Nilcomul, be paid by Bhubaneswari as guardian on behalf of the minor.

One of the consolidated appeals allowed: in the other, decree affirmed.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent, Nilcomul Lahiri: Messrs. *Gordon & Dalbiac.*

Solicitor for respondents, Bhubaneswari Debi and Jotindramohun Lahiri: Mr. *S. G. Stevens.*

C. B.

P. C.* 1888 *April* 25, 26.

MUHAMMAD YUSUF (PLAINTIFF) *v.* MUHAMMAD HUSAIN (DEFENDANT.)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Evidence—Costs.

One of two co-sharers, by ancestral title in the under-proprietary right in certain villages, obtained, in 1870, decrees against the talukdar for subsettlement, and getting possession had his name entered in the *khewat*. The other co-sharer remained entitled to claim that this possession was held partly for him.

The present suit was brought upon two agreements, purporting to have been made in 1870, between the two co-sharers, while proceedings to obtain the above decrees were pending, to the effect that, whereas both had claims against the talukdar, one only was to sue him, the other paying half of the costs and being entitled to receive half of what might be decreed.

The Judicial Committee, upon the evidence, concluded that the Appellate Court, attributing too much to certain omissions and acts on the plaintiff's

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part, which were more or less explained, had erred in reversing the decree of the first Court, which maintained the agreements, depriving the plaintiff of his costs in that Court only.

APPEAL from a decree (18th November 1884) of the Judicial Commissioner, reversing a decree (2nd January 1884) of the Judge of the Lucknow District.

This suit, between parties having the same grandfather, was instituted on the 28th June 1883 by the plaintiff against his cousin Muhammad Husain, who had, by orders (14th November 1870, and 22nd December 1870) obtained by him in the settlement Courts, been declared to have, "along with his co-sharers if any there be," rights, as under-proprietor, as against Arjan Singh, talukdar, in villages Makunpur, Chandrauli, and Khanpur; also in a four-anna share of another village named Olehipur, forming part of a taluk named Bhilwal in the Bara Banki district.

The joint interest of the family to which the cousins belonged prior to these proceedings was shown in the records of 1858, referred to in their Lordships' judgment.

The talukdari rights in Bhilwal had been purchased in the time of the Nawabi by Arjan Singh, as was decided on 8th July 1868, in a suit brought by Imdad Ashraf, who was a sharer to the extent of twelve annas in zemindari rights in the village of Olehipur.

One of the cousins, Muhammad Husain, as to all four of the villages above named, and Imdad Ashraf as to Olehipur, asserted their zemindari claims, as against Arjan Singh, to a sub-settlement; and, to establish these rights, three suits on the 28th February 1870 were instituted against Arjan Singh by Muhammad Husain in respect of each of the three first named villages, and a fourth suit by him and Imdad Ashraf in respect of their rights in Olehipur.

These resulted in decrees in favor of Muhammad Husain, and "all entitled to share in the sub-settlement of the respective villages."

Whilst those suits were pending, the agreements, according to the plaintiff's case, were executed, which gave rise to the present suit. The first of them, referred to as No. 24, purported to

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have been written and signed by Muhammad Husain on 2nd May 1870, and related to the three villages first named. The second agreement, referred to as No. 25, was dated 1st September 1870, and purported to relate to the four-anna share of Olehipur. Both agreements were to the effect that, in consideration of Muhammad Yusuf's advancing one-half of the expenses that might be incurred in carrying on the litigation as to the under-proprietary right, Muhammad Husain would give up to him half of whatever he might recover, with the exception of rent-paying and rent-free *sir* land and groves, which were already held by the parties, each holding his own portion. The *khewat* of the villages, which was subsequently prepared under the terms of s. 56 of Act XVII of 1876, was verified by Muhammad Husain, whose name was entered. Notices were issued on 4th August 1871 for any claimants to come forward, but Yusuf did not then make any claim, nor did he at any time, before bringing this suit, attempt to have *dakhil kharij*, as one of the sharers in the villages, made in his name.

In the present suit the plaintiff averred that possession was obtained of the lands sued for in August 1871, and that after such possession the defendant, down to December 1879, acted according to the agreements, and accounted to the plaintiff for his share of the profits of the three first-named villages, and plaintiff received his share of the profits of the fourth village from Imdad Ashraf, who was the sub-settlement holder of that village, and was entitled to the remaining three-fourths of that village, but that in December 1879 the defendant refused to continue to give the plaintiff his share of the profits, which constituted the cause of action.

The defendant, by his written statement, denied the execution of the agreements in question, and his rendering accounts to the plaintiff after he had obtained the decrees against Arjan Singh, and that plaintiff had contributed to the costs of the suits in question. And he pleaded that under the 43rd section of the Code of Civil Procedure (*i.e.*, as to the splitting of claims), the present suit was barred by two suits which the plaintiff had brought, and in which decrees were made in March and August 1871, as to the *sir* lands and *nankar*.

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Issues having been fixed as to the above points, the District Judge found that the agreements were proved; also that the subsequent rendering of accounts, by the defendant to the plaintiff, had taken place as alleged; while, as to any bar under s. 43, there had been no splitting of claims, the former suits having related to matters not belonging to the present one. He, however, concluded as follows: "I think the plaintiff's conduct was such that the costs of the suit should not be awarded him."

On an appeal to the Judicial Commissioner by the defendant, that Court was of opinion that the execution of the agreements was not proved. And, as to possession, the Judicial Commissioner rejected the accounts which the first Court had accepted, as the alleged writer, one Hub Lal, whom the plaintiff had examined, had denied his writing; and the Judicial Commissioner further expressed his opinion that the plaintiff's allegation as to his continuing possession till 1879 was discredited by a statement found in a petition of his in 1876, when he was applying for a certificate to enable him to appeal to Her Majesty in Council, against a decree of the Judicial Commissioner of Oudh, made in November 1875, in a suit relating to other property and brought against another party.

On this appeal,—

Mr. *R. V. Doyne*, for the appellant, argued that the agreements in question were established by the evidence, entitling the appellant to his half share. He adverted to the two annas share of Olehipur claimed, and the appellant's receipt of the profits of that share, as to which there was no defence.

Mr. *J. Graham*, *Q.C.*, and Mr. *C. W. Arathoon*, for the respondent, contended that the plaintiff had failed to prove that the agreements had been executed, or the arrangement made. They referred to the alleged reasons for the omission to register. The reason avowed by the plaintiff (though registration was not compulsory) discredited him, it being that registration was omitted, and also he did not join in the suit, in order that his and his father's interest in the property might not be known.

Mr. *R. V. Doyne*, for the appellant, was not called upon to reply.

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Their Lordships' judgment was delivered by

LORD HOBHOUSE.—In this case the suit is founded on two agreements, which are dated respectively 2nd May and 1st September 1870. The two agreements are exactly similar in character. The first, which is called No. 24 in the suit, relates to three villages, and the effect of it is this: that, whereas the plaintiff and the defendant both had claims against the talukdar for an under-proprietary right in these three villages, the claims should be prosecuted in the name of the defendant, the plaintiff paying half the costs and receiving half the profits when the right was established. The second agreement, which was No. 25, was to exactly the same effect with respect to a small portion of a village called Olehipur, which seems to have been of very little value.

Now, though the suit is founded entirely on these agreements, and not on any previous claims, it is not unimportant to consider what was the position of the parties antecedently to the agreements. As the genuineness of the agreements is disputed, it is a material consideration to see whether they contain anything that was at all of an extravagant or monstrous nature. The plaintiff and the defendant are near relatives, and at one time were indisputably co-sharers in some interest in the three villages, which were ancestral property. That is made manifest by the record of proceedings in the Settlement Court in the year 1858, when we find a petition presented by the plaintiff and defendant and two other applicants, stating that settlement had been made with those four, and praying that a fresh settlement should be made to the four, and it is mentioned that three others joined as shikmis. The order which was made on 5th May 1858 was that the settlement be made with the petitioners, and that leases be granted, and so forth. Therefore, there being on record this evidence of joint title in the plaintiff and the defendant, there is no improbability in the plaintiff's account that he intended to sue for his right in the villages, but that the arrangement was made that the defendant should sue, and that the costs should be paid, and the profits shared, in the way he states. What is certain is that the suit was instituted by the defendant against Arjan Singh, who was

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the talukdar against whom the sub-proprietary right was claimed. That suit failed before the Settlement Officer, but on appeal with regard to the village of Olehipur, the Commissioner gave the plaintiff a decree. That decree was made on the 4th July 1870, and it gives an under-proprietary right in mouzah Olehipur to Muhammad Husain the defendant, Imdad Ashraf who claimed for another branch of the family, and other co-sharers if any there be. After that decree was made for Olehipur, the Settlement Officer made a fresh decree for the three villages, following the Commissioner's judgment in the case of Olehipur. His decree bears date the 22nd December 1870, and is in favour of Muhammad Husain and all entitled to share the sub-settlement of the three villages.

Now under that decree the defendant obtained possession, and it seems that he got his name entered in the *khewat* to which Mr. Arathoon has just been drawing their Lordships' attention, and he holds possession up to this moment. The plaintiff being undoubtedly a co-sharer in 1858 is entitled to say that, whoever gets possession under that decree, holds partly for him.

That being the position of the parties, the only point on which the agreement gives to the plaintiff any further right than he might claim independently of the agreement, is this: that the agreement admits, as between himself and the defendant, that the plaintiff is the only party entitled to share in the benefit of the decree. How it was that the other parties named in the decree of 1853 have fallen out their Lordships do not know, but no defence was raised on that ground or on any *jus tertii*. The defendant claims that he is solely entitled, and that no agreement whatever was made with respect to the profits of the estate governed by the decree.

The main question is whether these agreements are proved. The District Judge has held that they are. The Judicial Commissioner thinks that they are not. Taking No. 24, the agreement purports to be witnessed by nine persons. No doubt some of the names were written by others on the speculation that the witnesses would ratify what was done, and other witnesses affixed their names after the agreement was executed and not at the time. That proceeding is very irregular, very improper

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and if any attempt had been made in this suit to represent that persons named as witnesses were there who really were not there, it would be fraudulent. But no such attempt has been made. Four witnesses have been called, and they all honestly say where they were at the time. It turns out that only one was present at the time, but no attempt has been made to conceal the fact, neither is there any contradiction of what they say upon that point. What do they say? Nawab Ali, who seems to be a perfectly independent man, says: "I signed No. 24 as witness; I cannot say where it was written. I signed in the Commissioner's cutchery." It was not written at the Commissioner's cutchery, or executed there, and he says honestly that was so; but the document was brought to him by Muhammad Husain, and he was told to witness it and he did so. It is irregular, but it is not untruthful. Then Imdad Ashraf says: "I signed No. 24. It is in Muhammad Husain's handwriting; both brought to me to sign at my house fifteen or sixteen days after it was written in Chadikapurwa." That of course is an irregular thing, but it is perfectly honest, and it shows the admission of the agreement by the parties to it. The plaintiff himself positively swears to its having been written from a previously prepared draft by the defendant in his presence, and Beni Parshad, who seems again to be perfectly independent—he is a ryot holding lands under both parties—says the same thing. He was present, and the only witness who was present. In cross-examination none of these witnesses are shaken in the least. No counter-evidence is produced. No facts are shown inconsistent with the story told by any one of the four witnesses who swore to the execution, or to their subsequent signature at the request of the defendant. They were believed by the District Judge, who says they were trustworthy witnesses, and their Lordships cannot hold that there is any contradiction of their testimony merely because other persons are named as witnesses who were shown not to have witnessed the document at all either at the time or otherwise, or because there was one who did sign the document whom the plaintiff did not think fit to call.

But then another objection is made. It is said that the document was not registered. Non-registration is no bar to the

validity of the document, but it is said that the plaintiff gives as a reason for non-registration that he was committing a fraud upon the Court. The reason no doubt is very absurd. He says this: the evidence of his father Riasat Ali was of importance in the suit against Arjan Singh, and he and the defendant believed that if the plaintiff's interest was made manifest by the registration of the document, Riasat Ali's evidence would go for nothing in the suit against Arjan Singh. It is a childish mistake to make. It shows a disposition to be a little tricky. But it is not suggested that any false evidence was given in the suit against Arjan Singh; it is not suggested that by these means Riasat Ali was rendered a competent witness, whereas otherwise he would have been an incompetent witness. Nothing was done by way of fraud upon any human being. All it shows is a disposition to conceal something which happened in order that the parties might reap a benefit in the suit which was pending, and their Lordships think that quite sufficient importance has been given to the matter by the District Judge, who, on account of this little stratagem, has deprived the plaintiff of his costs in the suit.

Now, so far there is nothing in the circumstances to induce their Lordships to entertain any reasonable doubt that the parties who swore to the execution of these documents have sworn to the truth, and if the case rested there they would decide in favour of the genuineness of the documents. But the case does not rest there. There are in the record detailed accounts of the three villages which the plaintiff swears were rendered by the defendant to him, and they are also sworn by the plaintiff and others to be in the writing of one Hub Lal, a putwari of the villages, and to have been sent by the defendant to the plaintiff. One witness goes so far as to say he saw Hub Lal write the accounts. Possibly he may be wrong there. There is no need to decide whether he is right or wrong. Hub Lal denies writing or signing the accounts. But he does not deny their correctness. He does not deny that they were made out or sent, or that the payments were made upon this footing. And what is still more extraordinary is that the defendant does not come forward to say one single word about these accounts. He produces witnesses to say they are not in Hub Lal's handwriting, but he

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himself does not say one word about them. Now, if the accounts were forged, it would be a forgery of the most portentous kind, consisting as they do of a quantity of items purporting to be holographed by Hub Lal, and setting forth the various payments and expenses for these villages. Nothing would be more easy to expose than such a forgery as that. It is quite certain that a person forging these accounts would fall into a number of mistakes, and on the mistakes being shown the forgery would be made manifest. No evidence of the kind is given. The District Judge on that evidence believed that the accounts were made out and rendered by the defendant to the plaintiff. What the Judicial Commissioner held on the point is not so easy to say. He says they are valueless, and are of no weight, and he mentions that Hub Lal has denied having written them; but whether he held they were really forgeries, or whether he held that, being genuine, and being signed, they were of no value as evidence, cannot be learned from his judgment. It is clear that they are of the greatest value as evidence, because they could not have been sent by the defendant to the plaintiff except on the footing that the plaintiff was entitled to an interest in the villages.

There is one thing more. A series of letters from the defendant to the plaintiff is produced, and the same observations, or very nearly the same observations, occur upon the letters that have been made upon the accounts, and they need not be repeated. The letters are inexplicable, excepting as referring to these agreements, and as admitting an interest on the part of the plaintiff in the three villages.

The result is that their Lordships think that the District Judge was right in giving the plaintiff a decree, and that the Judicial Commissioner was in error in disturbing that decree. He should have dismissed the defendant's appeal with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect. The respondent must pay the costs of this appeal. *Appeal allowed.*

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

CHANDI CHURN BARUA AND OTHERS (PLAINTIFFS) *v.* SIDHESWARI DEBI (DEFENDANT).

P. C.* 1888 *April* 24 & 26.

[On appeal from the High Court at Calcutta.]

Grant, Construction of—Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.

A Hindu owner cannot make a conditional grant of a future interest in property in favor of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That he would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant.

The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing covenantees, to give the villages to them in the event specified. *Held*, that in either view, it was equally ineffectual.

Held, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendant you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance.

APPEAL from a decree (8th July 1884) of the High Court, reversing a decree (21st September 1881) of the Subordinate Judge of the Goalpara District.

The appellants, who were plaintiffs in the suit, were a family named Barua, of the Kayest caste, which for many generations had members in the service of the Rajas of Bijni. The respondent was the widow of the late Raja, who died after the institution of this suit against him, and who represented him on this appeal.

* *Present:* LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

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Of the Raj estate, that part, within which the villages now claimed were situate, had been in British territory since 1765, and the villages were settled in the pergunnah named Khutaghat; the rest of the raj estate having, since the annexation in 1864 of the Eastern Dooars, formed, like that pergunnah, part of the Goalpara district. Before 1765, the Baruas were in possession of three other villages under grant from the Rajas. They now claimed further possession of four villages in addition, under an instrument purporting to have been executed on the 15th Pous, of the Pergunnah year 1185 (December 1778), by the then Raja of Bijni, Mukund Narain Bhup. This purported to be in favor of the undermentioned Baruas, besides others of the family, who had died childless, *viz.*, Dharamsil Barua, grandfather of the plaintiff, Nandkumar Barua, and Kamlakant Barua, grandfather of the plaintiffs Chandi Churn, Jagarnath, and Chunder Madhub, agreeing that the three mouzahs, Kaitpara, Shamraipara, and Mauriagaon, that were at that time in the possession of the ancestors of the plaintiffs, should remain in their possession from generation to generation; that the sons, grandsons, heirs and representatives of the Raja Bahadoor should in future maintain the sons, grandsons and heirs of the persons in whose favor the gift was made; and that in default of this, they should relinquish to them the possession of other four mouzahs, namely, Bhotgaon, Dingaon, Daborgaon, and Salbari; and the heirs of the persons in whose favor the gift was made should be at liberty to take possession of these mouzahs, and to enjoy and possess the same as rent-free properties, by paying annually Rs. 190 as *mangon* to the estate of the Raja. And the plaintiffs alleged that in breach of that undertaking to support them by service from generation to generation, the Raja in April 1876 dismissed the first plaintiff from his service, and did not provide the other plaintiffs with service, though they were fit and proper persons and made application. And on that ground they claimed possession of the four villages.

For the defence, the genuineness of the instrument was denied, as also the plaintiffs' allegation that they were competent for the Raja's service. It was also contended for the defence that, supposing the plaintiffs to have any right to maintenance out

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of the defendant's estate, the profits of the three mouzahs, already in their possession, were sufficient.

Issues were fixed by the Subordinate Judge, who found the instrument to be genuine, and held that the plaintiffs were entitled to have possession, according to the presumable intention of the parties, of the four villages. On the issue fixed by the Judge as to whether there had been any breach of the terms of the document of 1776, his decision was as follows:—

"In this document, Raja Mukund Narain recites that the grantees have, from the days of his ancestors, been supported (*parwarish*) in various ways (*har shurate*), such as by service in the kingdom, *and* by grants of villages and lands. The various ways in which they have been supported are explained to be by 'service in my kingdom *and* (not *or*) by grants of villages and lands.' The *parwarish* consisted of these two things; not of one or the other, but of both. Mukund then goes on to say that he also supports them (*pratipalan*) in the same manner (*shei mate*), *i.e.*, by service *and* by grants of villages and lands. The word *pratipalan* has clearly the same meaning as the word *parwarish*. The expression *shei mate* places this fact beyond doubt. A pure Bengali word is substituted for a Hindustani word. The Raja then says that in case in his time, or in the time of his descendants, they or their descendants should not be supported (*pratipalan*) in various ways (*har shurate*), he then and there assigns to them these seven villages as a permanent remuneration or allowance. We have already seen what the *pratipalan har shurate* means. After having thus assigned to the grantees these villages, he goes on to revoke the assignment, saying that, as they were at that time being supported (*pratipalan*) by the profits of three of the villages *and* by other means, he will not make over to them the other four villages. That they are to continue to hold the three villages on the terms they were then holding them on. He then goes on to say,—'If ever in the time of my descendants you are not provided with the means of maintenance (*pratipalan ná kare*), then let those descendants of yours who may be living at that time (*i.e.*, when there is failure of *pratipalan*) produce this deed and hold all the seven villages at a quit rent of Rs. 100.

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"Now, what is this maintenance (*pratipalan-parwarish*), the failure to continue which by his descendants is contemplated by Mukund? It is clearly the *pratipálan*, the *parwarish* by various ways, *i.e.*, by service *and* by grants of land. This maintenance, as I have shown, consisted of two things, and a failure to give service, or a failure to give grants of lands, or both, would each and all constitute a breach of the terms of the document. And as no member of the Barua family is now maintained by service in the raj, although the family still hold the three villages stated by Mukund to be in their possession in 1185 Perganati, there has been a breach of the terms of the document. This breach took place on the 1st Bysack 1283 B. E., when Chandi Churn was dismissed by the defendant. This dismissal is admitted."

The Subordinate Judge, accordingly, decreed in favor of the plaintiffs.

This, however, was reversed by the High Court on appeal. A Division Bench (GARTH, C.J., and BEVERLEY, J.), after expressing doubts as to the genuineness of the instrument, gave judgment on its terms as follows:—

"Assuming that there is a sufficient consideration for the Raja's promise (about which there may be some doubt), in whose favor is the deed made?

"Is it a provision for all the Barua family in perpetuity, however many hundreds or thousands they may number?

"Does the continuance of the grant depend upon the whole Barua family continuing to serve the Raja or to reside within his jurisdiction?

"Would the grant be valid, although all the Barua family, or the large majority of them, deserted the Raja's territories, and those three or four only, or some or one of them, continued in his service?

"Or would the grant be valid if any of the Barua family refused to remain in the Raja's service at all, or proved themselves faithless or incompetent?

"All these points have been raised before us, and they present very serious difficulties, and we much doubt whether in point of law the instrument, if genuine, is enforceable at all. But

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assuming that it might be so under a different state of circumstances, and that the present plaintiffs were in a position to enforce it, can it now be said that the Raja has committed any breach of the contract, or that he is liable in any way to the present plaintiffs?

"We are clearly of opinion that he is not, and our reason for that opinion seems so unanswerable that we think it needless to deal with the other points in the case, which might perhaps present more difficulty.

"The plaintiffs' case is that one of them, Chandi Churn Barua, has been dismissed from the Raja's service, and that the other have not been employed by the Raja, although they are competent men, and willing to be so employed. This the plaintiffs contend is such a breach of the Raja's contract as entitles them to be placed in possession of the four other villages, Bhotegaon, Kaitpara, Daborgaon, and Salbari.

"The Raja says that as a matter of fact the plaintiff No. 1 was dismissed because he proved a faithless servant, and he also says that the other plaintiffs are incompetent men. But whether he is right or wrong in this, what possible ground is there for the plaintiffs' present claim?

"It is clear that by the terms of the agreement the Raja Mukund Narain does not undertake to keep the whole Barua family in his service, nor any particular member or members of that family. All he undertakes to do is to support them, and it is only in case of the family not being supported that the four additional villages were to be placed at their disposal."

The suit was accordingly dismissed.

On an appeal by the plaintiffs,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the interpretation placed on the terms of the instrument of 1778 A.D. by the Subordinate Judge was a sound one, and that it was a genuine document. That Judge had correctly construed the Bengali words referred to in his judgment, as denoting that the maintenance was to consist of two things, service and grants of land, not merely means of subsistence, from their own or other resources. Moreover no issue had been fixed on the question whether the possession of the villages formerly given to

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the Baruas was a sufficient maintenance for all the family; and the conclusion of the High Court on this point was disputed by the appellants. Even if the descendants had not been shown to be without any means of support, still, upon the correct construction of the grant, the suit had been rightly decreed by the Subordinate Judge; and the judgment of the High Court should be reversed.

Mr. *R. V. Doyne* for the respondent was not called upon.

Afterwards, on April 26th, their Lordships' judgment was delivered by

LORD WATSON.—This suit was brought by the appellants in the year 1880, before the Court of the Subordinate Judge at Goalpara, for possession of the four mouzahs of Daborgaon, Salbari, Dingaon, and Bhotegaon, which are part of the Bijni Raj estate in Assam. The original defendant was the late Raja Kumud Narain; and since his death the estate has been represented by his widow, the Ranee Sidheswari Debi, who is respondent in this appeal. The foundation of the appellants' claim is a deed alleged to have been executed by the Raja Mukund Narain, the ancestor of the defendant, in 1185 Perganati (1778 A.D.) in favour of certain members of the Barua family, to which the appellants belong. The document, according to the translation made by the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms:—

"Let peace and health rest upon your dwelling, O Kasi Nath Barua, dewan, O Ram Nath Barua, O Dharmasil Barua, O Komlakant Barua, O Ram Jibun Barua. Inasmuch as because of my having caused the daughter of Kasi Nath Barua, dewan, to lose caste by taking her away, you and all your connexions having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and forasmuch as from the days of the Maharajas, my deceased ancestors, you have all along been supported in various ways (*such as*) by service in my kingdom and by (*grants of*) villages and lands; and as I too am supporting you in the same manner, and as you have now become dispirited and (*therefore it is proper*) that I should show you even greater

kindness, (*I have determined that*) a means of support, that is, a perpetual wage, should be given to you; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways (*by me or by my descendants*), then, as a means of maintenance, that is to say as wages, I do hereby assign to you seven villages, namely, Shamraipara, Mauriagram, Daborgaon, Salbari, Kaitpara, Dingaon, and Bhotegaon in the nature of a fixed (*perpetual*) remuneration. However, as you are now being supported by (*the profits derived from*) three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants (*you will now hold*), and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance (*by them*), then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages, and also of the four villages (*now held*) khas (*by me*), enjoy possession of them rent-free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs. 100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed that Kasi Nath and Ram Jibun, two of the four grantees named in the deed, died without issue; and that the appellants are the living representatives of the other two, *viz.*, Dharmasil and Komolkant Barua. They are still in possession of the three mouzahs of Shamraipara, Mauriagram, and Kaitpara, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these mouzahs now yield an annual return of 4,000*l.* sterling. As might be expected in these circumstances, the appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Raja

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was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grant to descendants became at once operative in their favour, when the late Raja dismissed Chandi Churn from his service in 1876, and declined to employ either him or any other of the appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court: "Is the document filed genuine, and are the plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the respondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law; that at any rate the contingency upon which it depends is the failure of the Raja to provide maintenance, and that no claim can lie so long as the appellants have sufficient means of maintenance derived from her predecessors in the Raj.

The Subordinate Judge gave the appellants a decree in terms of their plaint. He found as matter of fact that the deed was genuine, and he held as matter of law that the conditional grant to descendants is valid and effectual, and that it became operative whenever the Raja failed to support them by giving employment as well as land. On appeal the High Court reversed his decree, and dismissed the suit with costs. The learned Judges (GARTH, C.J., and BEVERLEY, J.) held that the onus being upon them, the appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable, they held that the descendants of the four Baruas named in it have, according to the just construction of the instrument, no right to the four mouzahs so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words: "If ever in the time of

my descendants you are not provided with the means of maintenance." It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent promise that these Baruas and their descendants shall in future be "supported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the Raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raja, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contrac but a covenant running with the Raj estate, and binding

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its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same objections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of opinion that the judgment of the High Court must be affirmed and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

The appellants must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

C. B.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

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November 26.

ABAYESWARI DEBI (PETITIONER) *v.* SIDHESWARI DEBI (OPPOSITE PARTY).*

Superintendence of High Court—Criminal Procedure Code (Act X of 1882, s. 144)—Charter Act, 24 & 25 Vic., c. 104, s. 15—Order to abstain from certain act.

A Deputy Commissioner passed an order, under s. 144 of the Code of Criminal Procedure, prohibiting a person from collecting any rent or attempting to collect rent, either herself or through any of her officers or servants from the ryots of two specified pergunnahs. And also from effecting any sale or putting in hand any transaction with regard to standing trees or collected timbers in an estate, or erecting any *Adda* or *Kuchari* in such pergunnahs for a period of two months. Upon an application to set aside such order:

* Criminal Motion No. 371 of 1888, against the order passed by M. A. Gray, Esq., Deputy Commissioner of Goalpara, dated the 1st of October 1888.

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Held, that the High Court had jurisdiction, under s. 15 of the Charter Act, to set it aside if it were made without jurisdiction.

Held, further, that the acts which the petitioner was directed to abstain from were not acts which come within the meaning of the words "a certain act" as used in s. 144 of the Code of Criminal Procedure, and that the order should be set aside.

THIS was an application to set aside an order passed by the Deputy Commissioner of Goalpara, under s. 144 of the Criminal Procedure Code, prohibiting the petitioner from collecting any rents, either herself or through her servants, from the ryots of certain pergunnahs, and doing other specified acts in the Bijni estate.

The order complained of was made on the 1st October 1888 and was as follows :—

"To

RANI ABAYESWARI DEBI,

Goalpara.

"WHEREAS it has been known from various Police Reports, which are received in numbers every day, that many persons are being deputed and sent from your side to collect rents from the ryots of pergunnahs Habraghat and Khutaghat, and also to get possession of and to sell the timbers collected from the forest of the Bijni Estate:

"And whereas, on an inspection of the Register of the Collector of this District, it is seen that Rani Sidheswari Debi, as successor of the late Raja Kumud Narain Bhup, is the sole present proprietor (by the virtue of the registration of her name according to law) of the Bijni zemindari, and you have not yet got your name registered as proprietor of the whole or part of the said zemindari, and you have not yet established your possessory right and interest to the whole or part of the said estate:

"And whereas, on perusing the aforesaid several Police Reports, I have clearly understood that, if there be any collection of rent or attempt for collecting rent in this way, or if your officers, servants, or followers have anything to do with the timbers collected and stocked on your behalf from the Bijni estate, then owing to the rivalry between your people and the people of the legally registered proprietor Rani Sidheswari, which cannot be checked, the breach of peace, riots and bloodshed will unavoidably ensue. I therefore prohibit you by this from collecting any

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rent or attempting to collect rent, either yourself or through any of your officers and servants, from the ryots of pergunnahs Habraghat and Khutaghat, and also from effecting any sale, or put in your hands any transaction with regard to standing trees or collected timbers in the Bijni estate, or erecting any *Adda* or *Kuchari* in the aforesaid two pergunnahs within the period of two months from date, or until the final decision of the case under s. 145 of the Criminal Procedure Code, or until further orders."

The petitioner applied under s. 15 of the Charter Act and s. 439 of the Criminal Procedure Code to have the order set aside. The petition on which the application was made was in the following terms:—

1. That the Deputy Commissioner of Goalpara made an order on the 14th June 1888, purporting to have been made under s. 144 of the Code of Criminal Procedure, prohibiting your petitioner's *Naib*, Brojo Nath Dass, from making collection of rent on behalf of your petitioner from her extensive zemindari pergunnah Khutaghat in the district of Goalpara.

2. That against the said order your petitioner moved this Honorable Court on the 21st June 1888, and your Lordships were pleased to issue a rule to show cause why the same should not be set aside.

3. That again on the 28th June 1888 the said Deputy Commissioner made a similar order against your petitioner personally, and your petitioner moved this Honorable Court against the said order on the 9th July 1888, when a rule was granted by the Chief Justice and Mr. Justice Rampini to show cause why the same should not be set aside.

4. That both the rules, Nos. 201 and 227 of 1888, were eventually heard by Mr. Justice Wilson and Mr. Justice Rampini on the 3rd and 10th of August 1888, and the following order was passed: "With regard to the order complained of, we entertain the greatest doubt whether it is a legal order, that is, an order which the Deputy Commissioner had any right to make under s. 144; but inasmuch as it expires within a very few days we think it is not necessary for us to make any order on the subject."

5. That your petitioner has been peacefully collecting rent from such ryots of her extensive zemindari as willingly paid her any, but notwithstanding the aforesaid order of this Honorable Court the Deputy Commissioner of Goalpara has again made an order and issued a notice upon your petitioner on the 1st October instant, a copy whereof is herewith annexed, purporting to have been made under s. 144 of the Criminal Procedure Code, and prohibiting your petitioner from receiving any rent and forest dues which your petitioner can get without the least probability of the breach of peace.

Your petitioner begs to submit that the said order is quite contrary to law and ought to be set aside on the grounds :—

(*a*) That the said section does not empower any Magistrate to prevent any person from collecting rents from the tenants of any estate or issuing passes for selling forest produce.

(*b*) That the effect of such an order is to deprive your petitioner of all possession in the property.

Upon the application being made, a rule was issued calling on the opposite party to show cause why the order complained of should not be set aside.

The rule now came on for hearing.

Mr. *M. Ghose* and Baboo *Umbica Churn Bose* in support of the rule.

Baboo *Iswar Chunder Chukerbutty* and Baboo *Bassunt Comar Bose* for the opposite party.

Mr. *Ghose*.—The order is without jurisdiction. *Firstly*, because it is vague and indefinite in its character; *secondly*, because it interferes with the manifest legal rights of the petitioner to receive rents, which her ryots might willingly pay her; and, *thirdly*, because it is practically a repetition of an expired order and an evasion of the restriction imposed by the last clause of s. 144. The High Court has jurisdiction to set aside under s. 15 of the Charter orders professedly made under s. 144 of the Criminal Procedure Code, but not really coming within its scope. The question of this Court's powers to interfere was fully considered in *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (1). Since then

(1) I. L. R., 5 Calc., 7.

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it has been held that this Court has power to set aside orders made under s. 144, but without jurisdiction. In *Shurut Chunder Bannerjee* v. *Bama Churn Mookherjee* (1) it was contended that this Court could not interfere with orders made under s. 144, but White, J., decided against that contention. In *Bradley* v. *Jameson* (2), and *In re Prayag Singh* (3), orders made on the corresponding section of the old Code were set aside as being in excess of the Magistrate's power.

[MITTER, J.—I think we can interfere if you satisfy us that the order itself is one which the Magistrate had no power to make. The terms of s. 144 are very wide.]

The section gives power to make a certain order, which must mean a definite and precise order and not a general one, forbidding a man to refrain from doing a series of acts which he has ordinarily a right to do. The section must be very strictly construed. It could scarcely have been intended to invest Magistrates with power to interfere with the legal rights of persons. Could a Magistrate make an order directing a person to refrain from taking his food or from sleeping at night or from living in his own house, on the ground that the Magistrate thought that such an order was needed for the purposes specified in the section? Even if the Magistrate has such a power the order must be *one specified act* which must be complete in itself and of a definite character. Here the order is not to collect rents from the ryots of two pergunnahs. "Collection of rent" is not a definite act in itself, as it involves payment and receipt by several persons. Receipt of rent from different ryots is not a single act, and therefore does not come within the scope of the section.

Baboo *Iswar Chunder Chuckerbutty* contended that s. 144 was very comprehensive in its terms, and that the High Court had no power to interfere with an order made under that section.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The order complained of in this case was passed under s. 144 of the Criminal Procedure Code. The authorities are clear upon this point that, if the Magistrate had no jurisdiction to

(1) 4 C. L. R., 410. (2) I. L. R., 8 Calc., 580.
(3) I. L. R., 9 Calc., 103.

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make the order, this Court can interfere under s. 15 of the Charter Act. Therefore the only question that we have to consider is whether the order complained of is one which the Magistrate could make under s. 144 of the Code. The section says that: "In cases where, in the opinion of a District Magistrate, a Sub-Divisional Magistrate, or of any other Magistrate specially empowered by the Local Government or the District Magistrate to act under this section, immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order, stating the material facts of the case and served in manner provided by s. 134, direct any person to abstain from a certain act," &c., &c. Now by the words "a certain act" we understand that it must be a definite act. We have considered the order passed in this case, and we are of opinion that the acts which the petitioner is directed to abstain from are not acts which come within the meaning of the words "a certain act." She is directed not to collect rents from the ryots of two pergunnahs; no particular ryots are mentioned, but the rent is not to be collected from the ryots of two pergunnahs generally. We do not think that such an order as this comes within the words "certain act." Upon this ground alone we set aside the order and make the rule absolute.

H. T. H. *Rule made absolute and order set aside.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

PANNA LALL (DECREE-HOLDER) *v.* KANHAIYA LALL (JUDGMENT-DEBTOR).* 1888 *November* 19.

Insolvency—Civil Procedure Code, 1882, *ss.* 336, 337—*Act VI of* 1888—*Debt not in schedule—Execution of decree obtained against insolvent for such debt—Scheduled debts.*

A person, who has taken the benefit of the insolvent sections of the Civil Procedure Code, and who is undischarged, but has not inserted in his schedule a debt for which a decree is subsequently obtained, is not protected from arrest in execution of such decree, merely because his property is

* Appeal from Order No. 267 of 1888, against the order of J. F. Stevens, Esq., Judge of Gya, dated the 5th of June 1888.

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in the hands of the Receiver in insolvency. Such a person is liable to arrest under the circumstances and in accordance with the procedure provided for by the Civil Procedure Code Amendment Act (VI of 1888).

ONE Kanhaiya Lall Bhaiya, having been declared an insolvent under s. 351 of the Civil Procedure Code, his property and effects became vested in a Receiver. In his application to be declared an insolvent, Kanhaiya Lall referred to the fact that litigation was then pending between himself as a defendant and one Lutchmi Narain Das as a plaintiff, but his schedule did not show any sum as owing to Lutchmi Narain Das.

Lutchmi Narain subsequently obtained a decree against Kanhaiya Lal, and applied under s. 353 of the Civil Procedure Code to have his name inserted as a creditor in the insolvent's schedule. This application was however refused, and he then took out execution of his decree by attachment of certain monies payable to the Receiver. Subsequently the decree-holder assigned his decree to one Panna Lall, and the attachment referred to was withdrawn.

Panna Lall, on the 4th February 1888, applied in execution to attach the person of his judgment-debtor, and a warrant was issued for his arrest. The judgment-debtor, who had not obtained his discharge under either ss. 351 or 355 of the Code, being brought up before the Court, the District Judge, on the 11th February 1888, released him under s. 336 of the Code on security being found for the decretal amount, giving him liberty to apply within one month's time to be declared an insolvent in respect of the judgment-debt.

On the 5th June 1888 the judgment-debtor applied (during the pendency of the first insolvency) to be declared an insolvent in respect of the judgment-debt; but the District Judge, on reconsideration of the matter, held that no second adjudication in insolvency could be made, and that the original adjudication and declaration being good against all the world, the judgment-debtor could not, pending the insolvency, be arrested.

Mr. *Linton* for the appellant.—The original judgment-creditor not being a scheduled creditor, his assignee should have been allowed to execute the decree, the more so as the original decree-holder had applied to be inserted as a creditor in the schedule

and this application had been refused. The applications in the matter were all made before Act VI of 1888 came into force, and no notice was necessary under the old Act.

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Baboo *Kali Kissen Sen* for the respondent.—The order declaring the insolvency is an order *in rem*, and is good against all the public, and that being so, execution cannot issue against the insolvent.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

PETHERAM, C.J.—This is an appeal from an order of the District Judge of Gya refusing to execute a decree by attachment of the judgment-debtor's person, and the reason which he has given for that is, that the judgment-debtor had filed his petition of insolvency and had given up his property to the Receiver under that petition, and he relies upon the sections of the Code of Civil Procedure relating to insolvency as showing that, after he had done that, he was not liable to arrest at the suit, I suppose, of any creditor whose debt was owing before the time of his petition.

The particular debt in respect of which this applicant had obtained a decree and wished to arrest the judgment-debtor was a debt which the judgment-debtor had not included in his schedule, and we think that the learned Judge was wrong in the view which he took that the judgment-debtor was relieved from the liability to arrest in respect of that debt by the Code of Civil Procedure. The right to arrest or to attach the person of the judgment-debtor in execution of decree is a right which is created by the Code, and was an absolute right, and being created as an absolute right it could only be taken away or qualified by subsequent legislation, and subsequent legislation which was clear in its intention. The only section of the Code which takes away that right is s. 357, and s. 357 says that, where an insolvent has been discharged under the preceding sections, he shall not be arrested or imprisoned on account of any of his scheduled debts. But that qualification is expressly limited to the scheduled debts, and in our opinion the liability to arrest under this Code remained the same as it was before in the case of debts which do not appear in the schedule. It is clear that in this case the debt,

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in respect of which judgment was obtained, did not appear in the schedule, and therefore, in our opinion, the right of the judgment-creditor to attach his debtor by the arrest of his person was not taken away by s. 357, or by any of the insolvency sections, and at that time that right remained the same as it was before; and consequently we think the learned Judge was wrong in the conclusions which he came to that he was prevented from arresting this man under this section. But what escaped the learned Judge's attention, and the attention of both the learned gentlemen who have argued this case here, is the fact that the whole of the law upon this subject has been changed by Act VI of 1888. This Act takes away the right of the judgment-creditor to arrest his debtor and to put him in prison simply for the debt. A right to arrest under certain circumstances is retained, but it is a right to put the man in prison where he has the means of paying and will not pay as a means of compelling him to do that which he could do, and the inference from this provision is, that except for that purpose persons are not to be arrested, and therefore the provisions here have been inserted which provides that the arrest comes in but only under some circumstances.

We think then that the procedure which was adopted in respect of which this order was made is not applicable to the present condition of things, and that if the judgment-creditor wishes to enforce his remedy by proceedings under Act VI of 1888 he must make a new application to the Judge under that Act. At the same time we think that the Judge was wrong in the view which he took of the insolvency sections of the Code of Civil Procedure. Those sections do not afford any answer to an application of that kind in respect of an unscheduled debt; and we think that, if an application of that kind is properly made before him, it ought to be granted, notwithstanding the fact that the debtor has filed his petition, this particular debt not having been inserted in the schedule. With these remarks we decline to interfere, because the law is changed, and under the circumstances we think that there ought to be no costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice Pigot and Mr. Justice Rampini.

DINESH CHUNDER ROY, MINOR, REPRESENTED BY HIS NEXT FRIEND DURGA KANT ROY CHOWDHRY, MANAGER UNDER THE COURT OF WARDS (PLAINTIFF), *v.* GOLAM MOSTAPHA AND OTHERS (DEFENDANTS).* 1888 *June* 26.

DINESH CHUNDER ROY CHOWDHRY, MINOR, REPRESENTED BY HIS NEXT FRIEND DURGA KANT ROY CHOWDHRY (PLAINTIFF), *v.* FAHAMIDUNNESSA BEGUM AND OTHERS (DEFENDANTS).†

DINESH CHUNDER ROY CHOWDHRY AND ANOTHER, MINORS, REPRESENTED BY THEIR NEXT FRIEND DURGA KANT ROY CHOWDHRY, MANAGER UNDER THE COURT OF WARDS (PLAINTIFFS), *v.* NISHI KANT GUNGOPADHYA AND ANOTHER (DEFENDANTS).‡

Court of Wards Act (Bengal Act IX of 1879), s. 55—Bengal Act III of 1881, s. 7—Suit on behalf of ward by Manager without sanction of the Court of Wards—Sanction after appeal, Effect of.

In the absence of some order by the Court of Wards authorising the bringing of a suit, a suit instituted by a manager on behalf of a ward must be dismissed.

A suit was instituted in the Court of the First Subordinate Judge of Dacca on behalf of a ward by his manager without the order or sanction of the Court of Wards, and proceeded to judgment without any such order or sanction. The suit was partially decreed; and the manager appealed to the District Judge for that portion of the claim which had been dismissed by the Court of first instance. At the hearing of the appeal, an application was filed on behalf of the appellant, accompanied by a letter giving sanction to the institution of the suit the appeal and other proceedings connected therewith, with retrospective effect from the date of its institution. The Judge dismissed the suit. The plaintiff appealed to the High Court.

* Appeal from Appellate Decree No. 1506 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 23rd of May 1887, affirming the decree of Baboo Beni Madhub Mitter, Subordinate Judge of Dacca, dated the 28th of December 1885.

† Appeal from Appellate Decree No. 1519 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 26th of April 1887, affirming the decree of Baboo Chunder Mohun Mukerji, Munsiff of Munshigunge, dated the 16th of February 1886.

‡ Appeal from Appellate Decree No. 1507 of 1887, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 27th of April 1887, affirming the decree of Baboo Moti Lal Sirkar, Second Subordinate Judge of Dacca, dated the 30th of March 1886.

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Held, having regard to s. 55 of the Court of Wards Act, 1879, as amended by s. 7 of Bengal Act III of 1881, the lower Appellate Court was right in dismissing the suit.

Held, also, that the sanction given after appeal did not have a retrospective effect.

THESE were appeals from the judgments of the District Judge of Dacca, dismissing three suits instituted by Durga Kant Roy Chowdhry as manager under the Court of Wards without the order or sanction of the Court.

Appeal 1506.

The first suit, which was one for recovery of possession of land and for mesne profits, was filed on the 10th December 1883 in the Court of the First Subordinate Judge of Dacca on behalf of Dinesh Chunder Roy, a ward of Court, and proceeded to judgment without the sanction or order of the Court of Wards. The suit was partially decreed; and both parties appealed to the District Judge, the plaintiff for that portion of the claim which had been dismissed in the Court of first instance.

At the hearing of this appeal a preliminary objection was taken on behalf of the defendants, respondents, that the suit could not legally be brought without the sanction of the Court of Wards, or the Commissioner to whom the duty of granting sanction in such cases had been delegated. This objection was not taken in the Court of first instance, nor in the grounds of cross-appeal filed on behalf of the respondents; but it was admitted that notice of the objection had been sent by the pleader for the respondents to the pleader for the appellant. On the same day, the 23rd May 1887, an application was filed on behalf of the appellant, accompanied by a letter No. 385 $\frac{M.\ R.}{W.}$ of the 16th May 1887, from the Commissioner of Dacca to the Collector of Mymensingh, giving sanction to the institution of the suit the appeal and all other proceedings connected therewith with retrospective effect from the date of its institution before the Subordinate Judge; and it was suggested that this letter was a sufficient fulfilment of the requirements of the law, and conferred on the Court the power of treating the suit as properly instituted from the beginning.

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The District Judge dismissed the suit on the grounds that the terms of s. 55 of the Court of Wards Act, 1879, rendered a suit so coming before him one which he was bound to dismiss, and that the only case in which sanction with retrospective effect, giving validity to proceedings already instituted, could be given was stated in para. 2 of that section.

Appeal 1519.

The second suit, which was for a declaration of right to land, for recovery of possession and for mesne profits, was filed on the 12th January 1885, in the Court of the First Munsiff of Munshigunge, by Durga Kant Roy Chowdhry, as manager, without the sanction or order of the Court of Wards, and also proceeded to judgment without such sanction or order.

On the 16th February 1886, the Munsiff dismissed the suit on the ground that Government being a necessary party had not been made a party to the suit, although an application had been made at a late stage of the case on behalf of the plaintiff for leave to make Government a party. The plaintiff appealed to the District Judge.

At the hearing of the appeal the same objection—the absence of sanction by the Court of Wards to the institution of the suit—was taken on behalf of the respondents; but as the point had not been raised in the Court of first instance, the learned Judge gave the appellant an opportunity of showing "whether in fact any order or sanction had been given," when the following documents were filed on behalf of the appellant:—

(1) A letter from the Commissioner to the Legal Remembrancer, dated the 31st January 1886, a short time before the suit, which was instituted on 12th January 1885, was decided in the lower Court, recommending, at the instance of the Collector of Dacca, that Rs. 39 be allowed for the remuneration of associate pleaders;

(2) The sanction of this payment by the Legal Remembrancer;

(3) A report of the Collector of Mymensingh, dated the 19th March 1886, that he had authorised the filing of an appeal;

(4) The Commissioner's memorandum forwarding copy of the above (3) to the Legal Remembrancer for sanction to the filing of the appeal; and

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(5) The Legal Remembrancer's reply to the effect that "as appeal has already been filed, it must be continued."

The Judge held that there was nothing in any of these documents "of the nature of an order of the Court of Wards or of an order of any Government official under the Court of Wards to bring the suit;" and accordingly dismissed the appeal.

Appeal 1507.

The third suit was one for accounts upon an indemnity bond and was filed on 6th October 1885. At the hearing before the Second Subordinate Judge, the same objection, the want of sanction as in the two other suits, was raised on behalf of the defendants. The Subordinate Judge dismissed the suit on the ground that there was nothing to show that the Board of Revenue as Court of Wards had the authority of the Lieutenant-Governor to delegate to the Commissioner the power to order a suit to be brought by a manager on behalf of a ward of the Court. On appeal the District Judge held that the Subordinate Judge was wrong, but dismissed the suit on the ground of want of sanction, and in doing so said: "There arises, however, a further question on which he (the Subordinate Judge) expressed no opinion. Did the Commissioner in fact order the institution of the suit in question? The only document filed on behalf of the plaintiff with reference to this is the document marked Exhibit I., which is a letter from the Legal Remembrancer, giving *his* sanction, and there is nothing to show that any one else gave any order on the subject. Now whatever delegation there may have been to Commissioners, there was none to the Legal Remembrancer, and I am compelled to hold that for want of evidence of any order of the Court of Wards or the Commissioner the lower Court was right in dismissing the suit."

The plaintiff in each suit preferred an appeal to the High Court.

Baboo *Unnoda Prosad Banerjee* for the appellant in the three appeals.

In appeal 1506,—

Baboo *Rash Behary Ghose* and Moulvie *Seraj-ul-Islam* for the respondents.

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In appeal 1519,—

Baboo *Rash Behary Ghose* and Baboo *Kashi Kant Sen* for the respondents.

In appeal 1507,—

Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Roy* for the respondents.

The arguments sufficiently appear from the judgments of the Court (PIGOT and RAMPINI, JJ.), which were as follows:—

Judgment in appeal 1506.

This is an appeal from a judgment of the District Judge of Dacca, dismissing a suit instituted by a person appointed as manager under the Court of Wards in respect of certain interests, to which we need not refer, relating to property of which he was appointed manager. The suit was dismissed by the District Judge under s. 55 of the Court of Wards Act (Bengal Act IX of 1879) as modified by Bengal Act III of 1881, which adds three words to the section. It is admitted that the suit was filed in the lower Court without the order of the Board of Revenue, or the Court of Wards, or of the Commissioner, and proceeded to judgment in the original Court without any such sanction. The District Judge has held that the terms of s. 55 rendered the suit so coming before him one which he was bound to dismiss; and the appeal is against that decree.

We are of opinion that the District Judge was right in dismissing the suit. The terms of the section are: "No suit shall be brought on behalf of any ward unless the same be authorized by some order of the Court." The additional words added by Act III of 1881 are immaterial for the purposes of this case. It was suggested in the Court below, and it was argued here, that s. 55 is intended for the guidance of managers and not for the purpose of absolutely binding Courts of law in respect of suits by managers on behalf of wards. We have to gather the intention of an enactment from its terms, and though it is quite possible that the effect of this enactment was not sufficiently considered by its framers, we think the words used are such as to leave no alternative but the dismissal of the suit brought

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without *some order*, to use the words of the section, of the Court of Wards. "No suit shall be brought" are words as strong as could well be suggested. They are similar to the words used in English Acts which have been so interpreted, as, for instance, in an act of a different character referred to in the case of *Boyce* v. *Higgins* (1). There the words are: "No proceedings shall be taken by any person other than the party grieved without the sanction in writing of the Attorney-General;" and these were held to constitute in that case an absolute ground for holding that the suit could not be brought.

Then it was suggested that, inasmuch as at the hearing of the appeal by the District Judge an application was filed, accompanied by a letter from the Commissioner of Dacca to the Collector of Mymensingh giving sanction to the institution of the suit, that conferred, as in terms it was intended to confer, upon the Court, by the use of the word *retrospective*, the power of treating the suit as properly instituted from the beginning. It was contended that that document entitled, and if it entitled, it bound, the Court to entertain the suit. We think not. It would be a strange construction of the section which would give the department which, under the name of the Court of Wards, carries on the suit through its manager the power of rendering valid after decree proceedings which up to that date were invalid, and so empower it, if it pleased, in the interests of those for whom it managed the estate to affirm or to disaffirm a suit, according as it had or had not resulted in success. On that ground alone we think it would be impossible, in the absence of express words, to hold that, when the matter was before the lower Appellate Court on appeal, a sanction then given should validate the proceedings that had been issued. Further, we think that the view expressed by the learned District Judge, that the second paragraph of s. 55 provides for one case only in which a subsequent sanction is contemplated by the section, is a view entitled to great weight. For these reasons we hold that the learned District Judge was right in dismissing the suit; and we dismiss this appeal with costs.

Appeal dismissed.

(1) 4 C. B., 1.

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Judgment in appeal 1519.

This is also an appeal from a decision of the same District Judge, and in this case also the absence of some order by the Court of Wards was raised in the Court of Appeal, and the District Judge, taking the same view, dismissed the suit. In this case the learned Judge had to consider, not merely the effect of the absence of any order authorizing the bringing of the suit, but whether or not there was in existence any order authorizing the bringing of such suit; for it is an unfortunate characteristic of this section which is drawn with singular absence of regard to the rights of third parties who may be affected in costs, at any rate, by its provisions, that nothing is said in the Act as to the form or nature of the order which, under the terms of the section, is made an essential preliminary to the bringing of the suit. The public, the individuals against whom suits may be brought in contravention of the terms of this section, are not in any manner protected from suits being brought loosely and negligently, and in disregard of the provisions of the section, by the enactment of any procedure, with reference to the making or form of the order, such as ought naturally to have been found in the Act. The District Judge says: "All the papers in connection herewith that the pleader is able to show me are: (1) a letter from the Commissioner to the Legal Remembrancer, dated the 31st January 1886, a short time before the suit, which was instituted on the 12th January 1885, was decided in the lower Court, recommending, at the instance of the Collector of Dacca, that Rs. 39 be allowed for the remuneration of associate pleaders; (2) the sanction of this payment by the Legal Remembrancer; (3) a report of the Collector of Mymensingh, dated the 19th March 1886, that he had authorized the filing of an appeal; (4) the Commissioner's memorandum forwarding copy of the above (3) to the Legal Remembrancer for sanction to the filing of the appeal; and (5) the Legal Remembrancer's reply to the effect that 'as appeal has already been filed, it must be continued.' There is nothing in all these of the nature of an order of the Court of Wards, or of an order of any Government official under the Court of Wards, to bring the suit, and I think that this was a fatal objection." Accordingly, the defendant has, in this case,

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partly in consequence of the slovenly manner in which the Act was framed, partly in consequence of the manner in which the suit has been instituted, been put to costs and trouble, which probably no order of this Court, even though the suit is dismissed, can recoup him. We agree with the District Judge in the view which he has expressed, and we think he was right in dismissing the suit. The appeal is dismissed with costs.

Appeal dismissed.

Judgment in appeal 1507.

This appeal raises a slightly different question. In this case the original Court dismissed the suit on the ground that there was nothing to show that the Board of Revenue, as the Court of Wards, had the authority of the Lieutenant-Governor to delegate to the Commissioner the power of ordering a suit to be brought by the manager on behalf of a Ward of the Court. There, the learned Judge on appeal holds that the Subordinate Judge was wrong, and we agree with the learned Judge in entertaining that opinion. But while expressing that opinion, the learned Judge considers the question whether in fact there was an order authorizing the institution of the suit, and he says: "The only document filed on behalf of the plaintiff with reference to this is the document marked Exhibit I., which is a letter from the Legal Remembrancer giving *his* sanction, and there is nothing to show that any one else gave any order on the subject. Now, whatever delegation there may have been to Commissioners, there was none to the Legal Remembrancer, and I am compelled to hold that, for want of evidence of any order of the Court of Wards or the Commissioner, the lower Court was right in dismissing the suit." In the two cases with which we have just dealt, the proceedings had gone as far as judgment and decree before the question was raised. Here the question was raised before judgment in the original Court, and the suit was dismissed on the ground of the absence of proof of some order. Now, upon that point we referred the learned pleaders to the case of *Mahammad Azmat Ali Khan* v. *Ladli Begum* (1) before their Lordships of the Privy Council under the Pensions Act, in which they held that, where it appeared in a suit which

(1) I. L. R., 8 Calc., 434.

had been entertained under that Act that the certificate required by its provisions had not been issued, and where the Court stayed the proceedings and abstained from giving final judgment, but upon the filing of the certificate proceeded to give final judgment, the Court was entitled to do so. That case, however, depended, as we understand it, upon the special terms of that Act, s. 6 of which enacts that a Court, on receiving such a certificate, is *bound* to take cognizance of the claim; and their Lordships held that, upon the certificate being filed, the Court finding a pending suit, although irregularly instituted, was bound to take cognizance of the claim in that suit. It is to be observed that s. 4 of that Act, prohibiting a Court from taking cognizance of a suit without a certificate, commences with the words "save as hereinafter provided," which must be taken of course to refer to s. 6 as well as to the other portions of that division of the Act to which it applies. In the present case, too, it does not appear that any application was made to the Second Subordinate Judge to stay proceedings pending the obtaining of a sanction. We think that in this case also the decision of the District Judge was right, and we have only to add that this case again arises in part from the absence from the Act of any attempt at laying down a procedure to be followed with respect to the issue of the order which the Act requires as a preliminary condition to the institution of a suit. We shall bring these cases to the notice of our colleagues in the hope that perhaps some rule may possibly be framed to remedy the consequences, in some measure at least, of the unfortunate drafting of this enactment. We dismiss the appeal with costs.

Appeal dismissed.

C. D. P.

PRIVY COUNCIL.

P. C.*
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May 2.

CHAND KOUR AND ANOTHER (DEFENDANTS) *v.* PARTAB SINGH AND OTHERS (PLAINTIFFS).

[On appeal from the Chief Court of the Punjab.]

Res-judicata—Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103.

The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed, entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor.

Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favor of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code.

Held, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen.

APPEAL from a decree (16th May 1884) of the Chief Court, modifying a decree (2nd January 1883) of the Commissioner of the Jullundur division, varying after a remand to the Judicial Assistant Commissioner of the Gurdaspur district, and a return thereto (30th September 1882), a decree (16th May 1882) of the latter Judge.

The suit out of which this appeal arose was brought on the 11th February 1882 by the heirs, brother's sons, of a proprietor deceased in 1848, for a declaration that a gift made in 1879 by his widow, who had succeeded to his estate, would be inoperative as against their rights of inheritance whenever she should die. But the only question on this appeal was as to the application of ss. 102 and 103, Civil Procedure Code.

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Mussamut Chand Kour, the donor, was the widow of Sirdar Kahan Singh, who having gone, with his only son by her, to Multan, in 1849, was there killed, and the son also. Kahan Singh was a sharer to the extent of rather more than 200 ghumaos in villages Aliwal and Man Sandwal in the Gurdaspur district, where the widow remained; and his only other child was a daughter, who in after years had one son, Perak Singh. The widow, on the 29th March 1879, executed the deed of gift, now disputed by the sons of Kahan Singh's brothers, who in this suit claimed a declaration that it should not affect their rights to accrue on the death of the widow. The deed declared: "As I have kept with me my daughter's son, Perak Singh, son of Beja Singh of Majitha, now residing at village Man, from his birth, and have brought him up like a son, therefore I have, without any receipt of money, made a gift in his favor of the following property:" giving a list of Kahan Singh's holdings, according to the *khewat* of the villages above named.

Before this gift was made, on the 1st August 1878, two of the plaintiffs in the present suit, *viz.*, Partab Singh and Golab Singh, sued the widow claiming a declaratory decree, and an injunction forbidding the alienation of Kahan Singh's property. A further petition was filed on 30th August by them, asking that she might be restrained from selling or mortgaging pending the decision of that suit. The plaintiffs failed to appear at the hearing, and the result was that, on the 7th October 1878, the Judicial Assistant Commissioner made the order, which is set forth in their Lordships' judgment, dismissing the suit under s. 102, Civil Procedure Code.

For the defence of the present suit, it was set up that the order, dismissing the former one, barred it. The widow also alleged her right to make the gift to her daughter's son, who had, as she maintained, been adopted by her to Kahan Singh, under a power given to her by him on departing.

The Judicial Assistant Commissioner decreed in favor of the plaintiffs, holding that the present suit was not barred under s. 13, nor was within the provisions of ss. 102, 103; there not having been, in the former suit, any claim to set aside an existing gift. He also found that the alleged power to adopt

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was not proved; and held that the custom of descent, giving the inheritance to the brother's sons, as being nearer than a daughter's sons, could not be set aside.

The Commissioner, after a remand for further evidence, found the authority to adopt had not been established. He supported the gift only so far as it might relate to the widow's own estate. The decree of the lower Court was accordingly, in the main, upheld.

Both parties appealed to the Chief Court. That Court (Baden-Powell and Burney, JJ.) held that the suit was not brought upon the same cause of action as the previous one had been; the gift having been a new and subsequent act. The suit might, therefore, be maintained. As to the alleged adoption, the Judges were of opinion that, though something might have been said by the Sirdar, on his going on military service with his son, about the succession in the event of his death, no such proof of definite authority to adopt had been given as would be necessary before the ordinary course of succession could be set aside.

The result was a decree in the plaintiffs' favor, declaring that the deed of gift of 29th March 1879 was void and of no effect in respect of all the lands which it purported to convey to Perak Singh, as against the plaintiffs' reversionary interests.

On this appeal,—

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the appellants, argued that the suit of 1878, having been dismissed under s. 102, the present suit fell within the prohibition of s. 103. The claim then made was more general than the present, having in view any mode of alienation by the widow, which it sought to have prohibited. The widow's making a deed of gift was included in the general term alienation. If a claim or ground arose out of, and depended upon, the same right as that which was in question in the former suit, it would come under s. 13 as *res judicata*. *Hunter* v. *Stewart* (1), *Thakur Shankar Baksh* v. *Daya Shankar* (2) were referred to.

The respondents did not appear.

(1) 13 L. J. Ch., 349.

(2) L. R., 15 I. A., 66; I. L. R., 15 Calc., 422.

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Their Lordships' judgment was delivered by

LORD WATSON.—In this case the defendants in the original suit, who bring this appeal, are: (1) Mussamut Chand Kour, widow of the late Kahan Singh; and (2) Perak Singh, to whom the first appellant in 1879 made over by deed of gift the fee of her deceased husband's estate. The plaintiffs and respondents are the four nearest agnates of Kahan Singh, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative and cannot affect their reversionary rights. It is admitted that Chand Kour has merely a widow's interest in the estate; and it is also admitted that Perak Singh, in whose favour she executed the deed of gift, is a stranger to the succession. The only point which has been argued on behalf of the appellants is, that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the respondents, Partab Singh and Golab Singh, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased, which was then in the possession of his widow. The plea in bar can only affect these two respondents, and cannot exclude the other respondents from obtaining a declaratory decree in this suit, which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

The proceedings which followed upon the plaint in the suit referred to were these: A defence was lodged for the widow, and on the 7th October 1878 the Judicial Assistant Commissioner pronounced this order, which has become final: "As the plaintiff has not appeared, though waited for up to the rising of the Court, and as the defendant, who is represented by her agent, denies the plaintiff's claim, it is ordered that the case be struck off under s. 102, Civil Procedure Code."

The provisions of ss. 102 and 103 of Act X of 1877 require therefore to be considered. The dismissal of a suit in terms of s. 102 was plainly not intended to operate in favour of the defendant as *res judicata*. It imposes, however,

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when read along with s. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The Judge of first instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two Judges of the Chief Court of the Punjab upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the Statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second defendant. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise, and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different. If there had been a deed of gift in 1878 it might have afforded another and separate ground for granting the remedy which was prayed in that suit; but in point of fact it did not exist; and it is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising.

Under these circumstances their Lordships are of opinion that the judgment appealed from ought to be affirmed, and the appeal dismissed, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

C. B.

P. C.* 1888 *May* 3.

KAMINI DEBI (PLAINTIFF) *v.* ASUTOSH MUKERJI AND OTHERS (DEFENDANTS).

ASUTOSH MUKERJI AND OTHERS (DEFENDANTS) *v.* KAMINI DEBI (PLAINTIFF).

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code, s. 13*—Substantial matters in issue decided in a former suit—Right of shebait-ship of a family deb-sheba under a will.*

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, "offerings to the deity."

One or other of the brothers then for some years managed the estate as shebaits, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait.

In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it.

Held, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will, constituting,

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as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion.

APPEAL and cross-appeal from a decree (15th September 1883) of the High Court, in part varying, and in part affirming, a decree (3rd September 1881) of the Subordinate Judge of the District of the 24-Pergunnahs.

The main question on these appeals was whether the validity of provisions in a will constituting a family *deb-sheba*, and providing for the maintenance of the members of the testator's family, had been directly and substantially affirmed by a decree in a suit in which the present plaintiff, claiming as the daughter and heiress of the testator, was a party defendant, those who were plaintiffs in the former suit being now defendants.

The object of the present suit, which was instituted on the 6th May 1880 by the only daughter of the testator, the late Ramkomul Mukerji, was to obtain from the Court the proper construction of his will; to have it declared what provisions in it were lawful and valid, and which of them were invalid; to have declared the rights of the several parties entitled to the estate; to obtain possession of such part of the estate as she might be entitled to, and to have an account directed; to have ascertained and declared what was the nature and interest of the religious foundation, or *deb-sheba*; to have partition of that part of the testator's estate in respect of which it should be determined that the members of the family had joint rights, if any. Lastly, Kamini Debi claimed that a proper person should be appointed shebait, whether the plaintiff or any one else.

The will was dated 23rd Magh 1251, or 4th February 1845, and was registered. It was addressed to the testator's eldest wife, Baroda Sunderi, and to his brothers Ramkumar, Modhu Sudon, and Chunder Mohun.

After reciting that his properties, consisting of lands, houses, money and Government promissory notes, were his own and self-acquired, and directing the payment of his debts and the maintenance of his father, a resident of Benares, and the payment of the expenses of the marriage of this appellant and of the

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gift of a house and certain lands to her, and of the payment of certain further sums to her and her widowed sister, and to the testator's three wives, and to the widow and daughters of his deceased brother Dino Nath, and to Kamini Debi, the testator's daughter, the will continued thus :—

"All that remains after the above legacies, &c., are paid, I give unto the Thakur Gopaljiu, consecrated by my mother. You four are hereby appointed as shebaits. The daily worship of Gopaljiu and Sridhur and Banlinga (Siva) having been performed out of the above estate, the family of us, five brothers, shall be supported from the *prosad* (offerings to the deity), and you will also observe in honor of the deity Iswarjiu (Gopal) the ceremonies of Dole-jatra, Doorga-puja, Ras, Hindola, Nundotsab and all casual and daily ceremonies, &c., that is to say, the marriage ceremonies of your sons and daughters, the investiture of sons with the sacred thread, and the sradhs (offerings of funeral cakes) of father and mother. You are to pay to my *paratpar* (spiritual guide) an allowance of Rs. 5 every month, and Rs. 20 for the expenses of the family at Bakulia. You are authorized under this will to draw out, on giving receipts for, my Government promissory notes, which are deposited in the Collectorate of the 24-Pergunnahs as security for both of you, my second brother Ramkumar Mukerji, and for you, my third brother, Modhu Sudon Mukerji, and to carry out all the provisions aforementioned. You are further empowered to take back those promissory notes on giving receipts for the same, to draw the interest accruing thereon, and to sell them, &c., if necessary. All my ornaments and utensils of gold, silver, brass, pewter, &c., shall be divided equally among my three widows. You shall continue to reside with the family from generation to generation in those apartments of the dwelling-house at Kidderpore in which you live at present. To you, my eldest wife, Baroda Sunderi Debi, I have given a separate deed of permission to adopt a son in order to secure for myself the Jal-pinda ; and should you die before adopting a son as aforesaid, my second wife, Srimati Doorgamoni Debi, shall have the power to adopt a son, and on her death my third wife, Koilasbasini, is authorized to do so. The said adopted son shall, when he arrives at majority, be a manager in addition to the four mentioned above, that is to say, he shall make the management in the same way as you four shall do. Of the four persons aforesaid, should you and your heirs, as well as the adopted son when he arrives at majority, act contrary to the true religion of my ancestors, he shall be forthwith removed from the management mentioned in this my will. My three nephews (sisters' sons), namely, the three brothers Gonesh Chunder Banerji, Rango Lal Banerji and Hurri Mohun Banerji, of whom Hurri Mohun is a minor, shall get their food and raiment as they are doing at present ; and when they shall build their separate houses, they shall get the house formerly belonging to Jagamohun Shaha, which has been purchased benami in the name of Anund Chunder

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Banerji. My brothers and the others shall use my horses and carriages, &c., and keep (the latter) in repair in the same manner as they are now doing, and on your death these responsibilities shall similarly devolve on your heirs in the order of seniority, if they adhere to the ancient religion. No one shall have power to alienate the aforesaid properties by sale, gift, *hiba* or otherwise."

The testator died on the 1st of August 1845.

On the 11th September 1846 a certificate under Act XX of 1841 was granted to Ramkumar Mukerji alone, who continued to manage until his death in December 1859, when his brother Modhu Sudon succeeded him, retaining the management till his departure to Benares, about April 1878, at which place he died in October of the following year. His son Asutosh, one of the defendants in the present suit, managed the estate after his father's departure as his agent, and on his death assumed the office of shebait and manager of the estate of the deceased Ramkomul. The defendants in this suit were the heirs and representatives of Modhu Sudon, Nos. 1 to 7; 8, Damayanti Debi, the widow and heiress of the youngest brother Chunder Mohun; 9 and 10, the daughters of the fourth brother Dinonath, who died before the testator; 11 to 16 the representatives of the second brother Ramkumar. They all supported the will. Defendants 17 to 22 were the plaintiff's children, and 23 was her sister, a childless widow.

The defendants, besides supporting the will, urged that the suit was barred, as *res judicata*, by the decision in a previous suit instituted by Asutosh and his two brothers, defendants 1, 2 and 3 in the present suit, in which suit the present plaintiff was, among others, a defendant.

Damayanti Debi, No. 8, disclaimed the office of shebait in favor of the respondent Asutosh, who was, as she said, senior to all the other members of the family. He by his statement claimed as senior member of the family to be entitled, in accordance with the terms of the will, to the office.

Munmohini alleged that she, if the office was to go by seniority, was the eldest member of her father's family.

The suit, in which was made the decree on which the present respondents and cross-appellants relied as a conclusive adjudication barring the present suit, was brought on the 15th July 1863.

In that suit the plaintiffs were Asutosh Mukerji and his two brothers; and the defendants were the then shebait Modhu Sudon, Kamini Debi (the present appellant), with her husband (to whom she had been married after her father's death), Adhur Chunder Banerji, and also Bissambher Mukerji, with other members of the family. The plaint charged waste against the widow Baroda Sunderi and Modhu Sudon, two of the shebaits named in the will, in that they, in March 1862, had sold to the defendant Adhur Chunder Banerji one of the properties which had passed under the will, and asked to have that sale set aside; complaining also of the defendant Bissambher that he was wrongly obtaining the issue of attachments on the property. No specific relief was claimed against the defendant Kamini. She, however, answered in her written statement that the will was not genuine, and had never been acted on, claiming her father's estate by inheritance. The issues recorded in that suit questioned the genuineness of the will, the right of the plaintiffs to sue, and the validity of the sale. The Court of first instance, the Principal Sudder Ameen, held that the plaintiffs had a cause of action; that the will was genuine; and that the testator had effectively ordained that all the members of his family, as well as those of his brothers' families, should be maintained out of the *prosad*, instead of directing a more general distribution. He referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee* (1). His decree declared that the sale to Adhur Chunder Banerji was invalid, and that Bissambher Mukerji had no right to have a judgment, obtained by him against Ramkumar, satisfied out of the testator's estate which had passed under his will.

Kamini Debi and Bissambher appealed to the High Court, and a judgment of a Divisional Bench dismissing their appeals was delivered on 25th May 1865. The conclusion of that judgment was as follows:—

"On the whole, then, we are of opinion that the will is genuine and untainted by fraud; that it has been carried into effect by the devisees; that the endowment is both religious and secular, and that the wishes of the testator have been departed from; that the plaintiff, as having a vested interest in the will, has a right to sue to protect that interest; that the

(1) 8 Moore's I. A., 69.

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sale to Adhur Chunder, who had every reason to know the circumstances of the family, and who never impugned the will for years, was improper and should be set aside; that the lien attempted to be made out by Bissambher fails on every ground; and that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation."

The first of the issues fixed in the present suit in the Court of the First Subordinate Judge, Baboo Bhuban Chunder Mukerji, was whether the suit was barred under s. 13 of the Civil Procedure Code by the previous adjudication of the subject-matter. Having also fixed issues on other questions, among them, as to the validity of the will, and the construction to be placed on its provisions, he gave judgment to the effect that the decree in the suit of 1863 was a final determination of the matters in issue in the present suit. He considered that the testator's whole property was absolutely vested in the Thakur, and dismissed the plaintiff's claim by right of inheritance to the estate of her father, as well as her claim to be the sole preferential shebait.

His decree further ordered that the property having been vested in the Thakur, the plaintiff's claim to a partition be dismissed, and that the heirs and descendants of the five brothers, specifying them, "who are by Hindu law entitled to maintenance from the said five persons, shall be entitled to participate in the daily *prosad* of Gopaljiu Thakur as well as to reside in the Kidderpore dwelling-house." The will continued:—

"It is further declared that the expenses of the religious portion only of the ceremonies of sradh of the parents of the aforesaid persons, of the marriages of their sons and daughters, and of the jagnapobita ceremonies, shall be defrayed out of the income of the debutter estate, but on no account shall the said income be used in feasting Brahmins, &c., and other secular offices in connection with these ceremonies. It is hereby also declared that the said dwelling-house, along with the other properties of the testator, shall be under the control and management of the shebait for the time being, who shall look to the necessary repairs of the building as next in importance to the daily worship of Gopaljiu Thakur and distribution of *prosad* to the members of the family. The shebait for the time being shall strictly carry out the other provisions of the will concerning Doorga-puja, the celebration of Dole-jatra, Ras, Hindola and Nundotsab. If sufficient funds should not be forthcoming from the estate for their due celebration, then the religious portion of the ceremonies, *viz.*, the Pujas, &c., shall alone be performed. The defendant Damayanti Debi, who has the preferential right to be shebait, having declined to accept the duties of

shebait, the defendant Asutosh Mukerji, as the next senior member of the family, shall conduct all the duties in terms of the will."

On an appeal preferred by the plaintiff to the High Court a Divisional Bench (Sir R. GARTH, C.J., and W. MACPHERSON, J.) gave judgment on the construction of the will without referring to the issue in regard to the suit of 1863. The judgment referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee* (1) and to *Ashutosh Dutt* v. *Doorgachurn Chatterjee* (2), and did not support the opinion that the property of Ramkomul had absolutely vested in the Thakur, though the worship was a charge on the estate. The judgment proceeded thus:—

"It is clear that nothing was further from the intentions of the testator than that the plaintiff (and her sister) should, subject to the debutter trusts, absorb the whole family property. It would also seem foreign to the wishes of the testator that those members of his family only who were living at his death should take the whole of those proceeds to the exclusion of those who might come into existence after his death. We think his intention evidently was, that his own family and the families of his four brothers should all be maintained in perpetuity out of the *prosad* or surplus proceeds after providing for the festivals and services of the idol, and the specific bequests mentioned in the will. We take it to be clear, however, that according to the doctrine laid down in the *Tagore case* (3), such a trust as this in perpetuity would be contrary to Hindu law. But we think that, if possible, we are bound to carry out the intentions of the testator in so far as they can be carried out in a legal manner; and we consider that this may best be done by construing the will as a devise of the surplus proceeds for the benefit of the heirs of the testator himself and of his four brothers in equal shares, so that the heirs of each of the five should be entitled to one-fifth of those proceeds.

"The next question is, whether the plaintiff is entitled under the circumstances to ask for a partition; and we think she is. A commissioner or commissioners must be appointed to carry out the partition; and if the parties cannot agree amongst themselves to appoint a commissioner or commissioners, the Court below will make the appointment."

The decree of the High Court was as follows:—

"It is ordered that the decree of the Court below, except in so far as it declares that the defendant Asutosh Mukerji is entitled to carry on the worship, be set aside, and this Court doth direct that an ample portion of the family property be set apart for the worship, festivals, &c., as

(1) 8 Moore's I. A., 69. (2) I. L. R., 5 Calc., 438; 5 C. L. R., 266.
(3) L. R., I. A. Sup. Vol., 47; 9 B. L. R., 377.

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provided in the will, and that the residue be partitioned into five shares to the heirs of the five brothers respectively, each section of the family holding their one-fifth share jointly, but subject to partition *inter se* if any of them should take proceedings for that purpose. And it is decreed that the Court below do appoint a commissioner or commissioners with a view to carry out the directions given above. And it is further ordered and decreed, in accordance with the finding of the Court below, that the defendant Asutosh Mukerji do continue to be shebait, and as shebait hold such portion of the family property as will be set apart for the worship, festivals, &c."

The present appeal having been filed by Kamini Debi, the defendants Asutosh and the others obtained leave to cross-appeal with reference to the effect of the decision in the suit of 1863, which the judgment of the High Court omitted to notice.

Mr. *R. V. Doyne*, for the appellant.—The plaintiff did not seek to bring into question the genuineness of the will, or to dispute that the maintenance of the *deb-sheba* was a charge on the testator's estate, in whatever form the charge might be expressed; and she was not precluded by the decree of 1865, establishing those matters, from contending that there was no valid disposition in the will of the surplus proceeds of the estate. The High Court had rightly held that the testator's real object was to provide for the members of his family in perpetuity, and to prevent alienation; but the result should have been, not that at which the High Court had arrived, but that this object failed, as tending to a perpetuity, in a manner contrary to the principle of Hindu law on this subject. The true conclusion was, that the provisions of the will could not be carried out, except as to the maintenance of the *deb-sheba*; and that the plaintiff, subject to the latter provision, was entitled to the surplus and residue of the estate by her hereditary title. There had been no such effective devise, as had been supposed by the High Court, of the surplus proceeds for the benefit of the heirs of the testator and of his four brothers in equal shares; and if attempted it would have been too remote and ineffectual for the reasons explained in the *Tagore case* (1). Supposing that Asutosh came in as shebait, giving maintenance to all the members of the families respectively, how long was that state of things to last? And, as addressed only to the point of *res judicata*, these

(1) L. R. I. A., Sup. Vol., 47; 9 B. L. R., 377.

questions were not such as had arisen when the suit of 1863 was before the Courts. Circumstances had varied the position of the parties since the judgment of 1865. That decision it was not sought to dispute. But the estate with the accumulations of after years could not have vested in its entirety. The judgment in *Sonatun Bysack* v. *Juggut Soonderee Dossee* (1) did not completely decide the question. If it were contended that this should have been brought forward by the present plaintiff when defendant in the suit of 1863, the answer was that the state of things now existing had not then arisen. He referred to the judgment in *Soorjeemoney Dassee* v. *Denobundo Mullick* (2).

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondents and cross-appellants, were not called upon.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships do not think it necessary to call upon counsel for the respondents; but they are of opinion, after hearing the very elaborate and careful argument of Mr. Doyne, that they are bound to decide that the greater portion of the matter comprised in these appeals has been decided in a former suit.

The question arises under the will of the testator Ramkomul, which contains a gift of the residue of his estate to a family idol. Then he appoints four persons, his three brothers and one of his wives, to be shebaits of the idol, and he directs them to perform certain matters of ceremony and worship, and after that he says, "the family of us five brothers shall be supported from the *prosad*," which is translated "the offerings to the deity." That is the whole of the will that contains any gift, excepting specific and pecuniary legacies, to the members of his family.

The testator died in the year 1845, and the property was managed apparently in accordance with the will by one or other of his brothers, who were shebaits until October 1879. The survivor of the brothers was named Modhu Sudon, and he remained in the management for a great number of years. He died in 1879, and then his son Asutosh, the defendant in the present suit, took the office of shebaitship and the management

(1) 8 Moore's I. A., 69. (2) 6 Moore's I. A., 526.

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of the estate, and has managed it ever since. There seems to have been no quarrel or litigation in the family until the year 1863, when the plaintiff's mother, who was one of the shebaits, died, and the plaintiff became the heir-at-law of the testator. Immediately after that event she applied for a certificate of the usual kind authorising her to collect the assets of the testator, on the ground that she was entitled to the property; that is to say she challenged the validity of the will. This and other causes seem to have led to the suit of 1863, which is the suit that bears on the present case.

Now the construction of that suit was in this fashion. The then shebait was Modhu Sudon. The sons of Modhu Sudon, of whom the principal appears to have been the present principal defendant Asutosh, complained that he had made improperly a sale of part of the testator's property to one Adhur Chunder Banerji. They also complained that a person of the name of Bissambher, who was an execution-creditor of Ramkomul, was improperly attaching his assets, and they made Modhu Sudon, Adhur Chunder, and Bissambher defendants to the suit, attacking the purchase of Adhur Chunder and the execution proceedings of Bissambher. But they also made the present plaintiff, the heir-at-law, and the other members of the family, parties to the suit, and the suit was in effect one for establishing the will against everybody concerned. The prayer was, "that the Court on giving effect to the above will may be pleased to set aside the purchase by the defendant Adhur," release the items attached by the decree-holder, and prohibit the defendant Modhu Sudon "from infringing the terms of the will hereafter."

The present plaintiff appeared to defend that suit, and in her defence she raised the question of the genuineness of the will. She prayed the Court "to dismiss this unjust claim and uphold rights which I have to the properties left by my deceased father." She claimed as heir-at-law, and on the face of her written statement there does not appear to be any ground stated excepting the charge as to the genuineness of the will. But when the issues came to be stated a wider question was propounded. There was not only an issue as to the genuineness of the will, but a further issue whether or no the plaintiffs had any

right to have instituted the suit. That is a very vague issue, and might mean much or little, but what it did mean is plain from the judgment delivered in the suit. In dealing with that particular issue the Principal Sudder Ameen says this: "The Court is decidedly of opinion that the plaintiffs have a right of action, inasmuch as their vested right has been infringed upon by the acts of the trustees," that is, of the shebaits; and, again, "that the plaintiffs have as well a vested right of maintenance from the *prosad* of the idol, as a contingent one of superintendence and management of the endowed property cannot, if the will is genuine, be doubted for a moment." That is to say, he held that the plaintiffs had a right of action, not because anything was given directly to them, but because they had a right of maintenance through the *prosad* of the idol. If they had not that right they could not have sued, but he maintains the gift to the family which is made through the sides of the idol from the offerings given to the idol. To support his finding upon that issue he has to examine the will very elaborately. He does so, and examines the authorities which are applicable to the case, and the conclusion he arrives at is this. It is stated several times over in the judgment, but it is only necessary to quote one passage from the record. "The gravamen of the defendant's contention now is, that the endowment was illegal, as far as the Hindu law was concerned, and it was only nominal, it being got up by the brothers of the testator, who were chiefly interested in giving effect to the will. On carefully weighing these objections, and considering all the surrounding circumstances of the case, I am of opinion that the provisions of the will are no more repugnant to the principles of the Hindu law than was the endowment created by it nominal." Then he refers to a decision of this Board, and in applying it to the present case goes on: "The will under review, after providing for legacies, created an endowment on behalf of the family idol, and directed to appropriate the surplusage, if any, for the benefit of the children of the trustees. Viewing then the will in its true light, and analysing its provisions with reference to the principle recognized in the above authoritative ruling, I am of opinion that the will is perfectly legal," and he decrees accordingly: "That the suit be decreed; that the will be declared genuine," and so

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forth, and he gave costs against the present plaintiff. He could not have decreed that suit unless he had held that there was, first, a valid gift to the idol, and, secondly, that the plaintiffs in that suit, who were not heirs of the testator and had nothing given to them excepting through the idol, had a valid gift made to them.

The present plaintiff was not satisfied with that decree, and she appealed to the High Court, and one of the grounds of appeal was thus stated: "The alleged will of Ramkomul Mukerji, even if genuine, was revoked by his conduct, and is invalid under the Hindu law, and indefinite and incapable of being carried out with reference to the different provisions of it, the trust being nominal," that is, illusory. Another ground was, "that the rights of all parties under the will, if genuine, have not been properly interpreted." Upon that the High Court again examined the question of the validity of the will. It appears to have been argued on behalf of the defendant Bissambher more than on behalf of the defendant Kamini, the present plaintiff, but it was argued before them "that, while holding the will to have been really signed and registered by Ramkomul, we should consider it as a scheme for retaining property which was in reality joint in the hands of all the members, and for holding the creditors of the estate or of any member of the family at defiance." They examine the arguments against the validity as distinguished from the genuineness of the will, and hold that it is valid, and they sum up thus: "On the whole then we think that the arguments both for Kamini and for Bissambher, that the will is either a nullity or a disguise to throw dust in the eyes of creditors, fail when weighed against" the considerations that they mention; and they conclude "that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation." They therefore dismiss the appeal with costs.

Their Lordships take that to be a decision that the will contains a gift of the entire property to the idol; that the members of the family take only maintenance from the offerings made to the idol; and that it is a legal and valid gift in every respect.

Now what is the present suit? The present suit appears to their Lordships to be founded upon the total, or at least the partial, invalidity of the will. The first prayer of the plaint is "That upon a proper interpretation of the will of the said

Ramkomul Mukerji the Court will be pleased to determine and settle those provisions which are valid and lawful, and those which are illegal and invalid." Unless something in the will is illegal and invalid the plaintiff has no title whatever to get accounts or possession, or to do anything but to make a claim to the shebaitship. That she may do on the supposition of the entire validity of the will. It is not alleged that she has not received proper maintenance out of the offerings to the idol. She sues on the ground that there is some invalidity somewhere in the will, and that she, as heir-at-law, is entitled to take advantage of it.

Upon that view of the suit the Subordinate Judge held that the matter must be taken to be *res judicata*, having regard to the issues decided in the suit of 1863, and he ordered that the plaintiff's claim to get the estate of her deceased father by right of inheritance be dismissed. He also dismissed the plaintiff's claim for a partition, and he declared that the heirs and descendants of the five brothers, "who are by Hindu law entitled to maintenance from them, shall be entitled to participate in the daily *prosad* of" the idol, and to reside in a certain dwelling-house which was another matter in dispute. Her claim to be the preferential shebait of the idol was dismissed, not as *res judicata*, but as not warranted by the will.

An appeal was preferred from th at decree to the High Court which differed in opinion from the Subordinate Judge. On reading the judgment of the High Court it does not appear that they noticed the suit of 1863 at all. They do notice the plaintiff's application for a certificate in 1863, but the suit they leave entirely unnoticed. Why that happened is not explained, but it is a matter complained of in the cross-appeal presented by Asutosh. Their Lordships are left without any means of understanding how it was that the judgment came to be delivered without any observation upon the suit of 1863. However, the matter has been fully argued now, and their Lordships are of opinion that the view of the Subordinate Judge was right.

The case is governed by s. 13 of X of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863, in a suit in which the present plaintiff was defendant, and the present defendants were plaintiffs. Their Lordships' reasons have been assigned for thinking that the

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question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid, and passed the entire estate to the idol; and that the same question cannot now be raised.

Their Lordships express no opinion whatever whether they agree or disagree with the High Court on the construction of the will of Ramkomul. It may be that the opinion of the High Court now expressed is preferable to the opinion of the High Court expressed in the suit of 1863, but they consider that that question is not open to them. The matter was decided between the parties and never can be re-opened.

Then there remains only one question to be decided in the suit, and that is whether the plaintiff has a preferential title to be shebait. That depends upon one sentence in the will, which was written in Bengali, and their Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the Bengali grammar, and he delivered as his opinion that the effect of the will was to constitute as shebait the senior in age of the heirs of the original shebaits. The actual senior has disclaimed. The defendant Asutosh is the next senior in age, and therefore the Subordinate Judge held that Asutosh is the proper shebait. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

The result is that the appeal of the plaintiff wholly fails and the cross-appeal wholly succeeds. The High Court, in their Lordships' opinion, ought to have dismissed the appeal to them with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect, and the usual consequences will follow. The appellant Kamini must pay the costs of the appeal and the cross-appeal. *Appeal dismissed; cross-appeal allowed.*

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondents and cross-appellants: Messrs. *T. L. Wilson & Co.*

C. B.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Bannerjee.

KALUP NATH SINGH (PLAINTIFF) *v.* LALA RAMDEIN LAL AND OTHERS (DEFENDANTS).* 1888 *December 7.*

Partition—Suit to stay Partition by Collector—Beng. Act VIII of 1876, *ss.* 267 105—*Specific Relief Act (I of* 1877), *s.* 42—*Declaration of specific rights —Limitation.*

A person bringing a suit under s. 42 of the Specific Relief Act to stay a partition directed by the Collector under Beng. Act VIII of 1876, on the ground that a private partition has already been come to, must prove not only that there has been a private partition, but also that, under that partition, he is entitled to, and was in possession of, in severalty some specific portion of the property again sought to be partitioned by the Collector ; and such person is entitled to no declaration effecting the rights of other shares in the parent estate. *Khoobun* v. *Wooma Churn Singh* (1) distinguished.

Semble.—Section 26 of Beng. Act VIII of 1876 does not bar the right to bring an action, but merely limits the effect of the decree unless the action is brought within a certain time.

THIS was a suit under s. 42 of the Specific Relief Act, brought on the 25th September 1886, for the purpose of staying certain *butwara* proceedings directed to be effected by an order, of the Board of Revenue, dated the 8th April 1886, which order confirming the order of the Collector, decided that there was no sufficient evidence of a private partition having taken place regarding the land in suit. The plaintiffs alleged that he was one of the proprietors of Mehal Soa, which consisted of eight villages, entered as an entire estate in the Collector's *towzi ;* that the whole of this mehal had been privately partitioned between the several co-sharers, and that therefore no further partition proceeding could be had under Beng. Act VIII of 1876.

The defendants contended that the mehal had not been privately partitioned, and that the question was *res judicata.*

* Appeal from Appellate Decree No. 554 of 1888, against the decree of H. F. Mathews, Esq., Judge of Shahabad, dated the 15th of December 1887, reversing the decree of Baboo Koilash Chunder Mukerjee, Subordinate Judge of that district, dated the 7th June 1887.

(1) 3 C. L. R., 453.

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The Subordinate Judge found that there had been a private partition, and that a certain portion of the mehal, which was in jungle, was joint; he therefore held that the *butwara* proceeding under the Act should be stayed, save as regards a portion of the estate which was under jungle.

The defendants appealed to the District Judge, contending for the first time that the suit was barred by limitation under s. 26 of Beng. Act VIII of 1876; the District Judge held that the suit was so barred, the plaint not having been filed till more than five months after the Board's order for *butwara*, and the decree of the lower Court being of such a nature as to affect the progress of the proceedings taken under the Act; he therefore reversed the decision of the Subordinate Judge.

The plaintiff appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellant, contended that s. 26 of Beng. Act VIII of 1876 did not apply, and that private partition had been sufficiently proved, citing *Khoobun* v. *Wooma Churn Singh* (1).

Baboo *Mohesh Chunder Chowdhry* for the respondents.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

PETHERAM, C.J.—This is a suit brought by the plaintiff against the defendants to obtain certain declarations, and the facts of the case are, that the plaintiff and the defendants are co-sharers in a mehal called Mehal Soa, and that the defendants had taken proceedings before the Collector for the purpose of having that mehal partitioned amongst the co-sharers. The plaintiff objects to these proceedings on the ground that the mehal in question has already been partitioned, and he has accordingly brought this suit.

There are six prayers to the plaint. They are: (*a*) that it be declared that the lands of Mehal Soa have, from before, been separately in possession of the puttidars according to private partition; (*b*) that it be declared that the defendants, the applicants for the *butwara*, have no right to get it partitioned by the Collectorate; (*c*) that the orders of the Revenue Court,

(1) 3 C. L. R., 453.

the last of which was passed by the Board of Revenue on the 8th April, 1886, be set aside; (*d*) that a rubocar be sent to the Collectorate of this district for stopping the *butwara* proceedings till the disposal of this case by the Court; (*e*) that such other relief be granted by the Court as the plaintiff may be entitled to; and (*f*) that costs be awarded against the contending defendants.

The Subordinate Judge who tried the case has practically granted all the prayers of the plaint, and the District Judge before whom the matter came on appeal has reversed his decree and has dismissed the suit, on the ground that the whole claim is barred by s. 26 of Beng. Act VIII of 1876.

It is not necessary for us to say anything in this case with reference to any of the prayers in the plaint, except prayer (*a*), because they are practically abandoned, and with reference to (*a*) the judgment of the Subordinate Judge is a short one. With reference to that prayer, he declares that there is a private partition in the mehal.

As I said just now the District Judge has dismissed the suit on the ground that it is barred by limitation by s. 26. As to that I think it is enough for us to say that we do not agree with the Judge in his view of the section. That section does not, in my opinion, bar the right to bring an action; it only limits the effect of the decree, unless the action is brought within a certain time. But, although we do not agree with the Judge in the reasons for which he dismissed the suit, we think he was right in dismissing it.

As I said just now, the only prayer of the plaint which is pressed upon us is the part which declares that there has been a private partition among the co-sharers in the mehal. That being so, it follows that this is a suit brought under the provisions of s. 42 of the Specific Relief Act. That section states: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief."

In this case the plaintiff has brought this suit for the purpose of having it declared that there has been this

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partition, and that by this partition he is entitled to some portion of the property in severalty; and if what he had done had been to bring a suit to declare that he was entitled in severalty to some specific portion of property, then no doubt he would have been entitled to that relief if he proved it. But then he would have had to prove much more than he has proved in this case. He would have had to prove that there had been a private partition, and he would have had to prove that under that partition he was entitled to, and was in possession of, some specific area within this mehal. But he is not entitled, I apprehend, to any declaration unless it affects his right to some specific property. In this case, the decree falls short of that; because it only declares that there has been a private partition which does not carry the matter far enough, and in addition to that it professes to affect the rights of other parties who were not litigating those rights. The only thing the plaintiff was entitled to was a declaration with reference to his own property, and his own property according to his own case is some specific area within this mehal, not indicated by this decree.

The question then arises whether we can remand this case so as to enable the parties to get their rights tried. If we remanded the case we should have to remand it for fresh evidence to be taken, and for the case to be tried on different lines, and for a finding to be come to as to what specific pieces of land the plaintiff is entitled to under the alleged partition. That would not only involve the taking of fresh evidence and a fresh trial but also an amendment of the plaint. We do not think that any good purpose would be served by our adopting such a course, because all the costs which have been already incurred would be thrown away, and in fact it would be the same as if a fresh suit had been brought. Under these circumstances we think that the judgment of the District Judge dismissing the suit was right.

Our attention has been called to the case of *Khoobun* v. *Wooma Churn Singh* (1) as showing that such a suit as this can be maintained, although the specific land to which the plaintiff claimed to be entitled is not declared. But in that particular case the specific land does not seem to have been in dispute,

(1) 3 C. L. R., 453.

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The fact there was that all the co-sharers in the village were admittedly in possession of specific pieces of land, and the only question between the parties was whether the partition had given them the title to the partitioned land. This distinguishes that case from the present one, and therefore in our opinion that case does not conflict with our decision in the present case.

For the reasons then which I have given we think that the judgment dismissing the suit was right, although we do not agree with the reasons which the District Judge has given for dismissing it. In the result this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

CRIMINAL REVISION.

Before Mr. Justice Macpherson and Mr. Justice Trevelyan.

IN THE MATTER OF MADHUB CHUNDER MOZUMDAR (PETITIONER) *v.* NOVODEEP CHUNDER PUNDIT (OPPOSITE PARTY).*

1888 *November* 10.

Criminal Procedure Code (Act X of 1882*), s.* 487*—Judicial proceeding—Sanction to prosecute—Criminal Appeal, Hearing of by District Judge who has granted sanction to prosecute—Penal Code, s.* 210.

A complainant applied to a Munsiff for sanction to prosecute a decree-holder for an offence under s. 210 of the Penal Code, and upon the Munsiff's refusing such application preferred an appeal to the District Judge, who granted the sanction asked for. The decree-holder, having been prosecuted and convicted before a Deputy Magistrate, preferred an appeal, which came on for hearing before, and was disposed of by, the same District Judge who had granted the sanction.

Held, that the words "shall try any person," as used in s. 487 of the Code of Criminal Procedure, include the hearing of an appeal, and that the hearing of the appeal from the order of the Munsiff refusing sanction was a judicial proceeding within the meaning of the Code, and consequently that, under the provisions of s. 487, the District Judge had no jurisdiction to entertain the appeal against the judgment and sentence passed by the Deputy Magistrate.

THE facts which gave rise to this application were as follow: On the 15th September 1885 the petitioner, Madhub Chunder Mozumdar, obtained a decree for Rs. 44-7-6 against Novodeep Chunder Pundit and his brother in the Chandpur Munsiff's Court.

* Criminal Revision No. 351 of 1888.

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On the 12th December 1887 the petitioner took out execution of the decree against his judgment-debtors; and, although they declared that the decree had been already satisfied, they were compelled to pay the amount decreed into Court, as satisfaction of the decree had never been certified to the Court.

On the 9th January 1888 Novodeep and his brother preferred a complaint before the Magistrate against the petitioner charging him with offences under ss. 210 and 417 of the Indian Penal Code in respect of the execution of the decree, and were ordered by the Magistrate to procure the Munsiff's sanction to prosecute within seven days. On the 20th January the complainants applied for permission to withdraw the charge, on the ground that they were about to take proceedings against the petitioner in the Civil Court. They at the same time stated in their application that they would come forward at a future time with the Munsiff's sanction for the prosecution of the petitioner. The Magistrate thereupon dismissed the complaint under s. 203 of the Criminal Procedure Code. Some time afterwards the judgment-debtors obtained a decree for the refund of their money against the decree-holder (the petitioner), and applied to the Munsiff for sanction to prosecute him. Sanction was refused by the Munsiff, but was granted by the District Judge upon an application being made to him.

Thereupon the present prosecution was instituted, and resulted in the conviction of the petitioner under s. 210 of the Indian Penal Code by the Magistrate, who sentenced him to six months' rigorous imprisonment and a fine of Rs. 100, or in default of payment of such fine to a further period of 1½ month's rigorous imprisonment.

Against that conviction and sentence the petitioner appealed to the District Judge, who dismissed the appeal.

The following is the material portion of the judgment of the District Judge:—

"It is contended in appeal that the Magistrate, having once dismissed the case under s. 203 of the Criminal Procedure Code, had no power to take it up again of his own motion. I have carefully considered the arguments on this point advanced by the learned pleader for the defence, but I am unable to accept them. It is not at

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all clear from the terms of s. 437 of the Criminal Procedure Code that it is only the District Magistrate who can of his own motion take up again a complaint already dismissed under s. 203 of the Criminal Procedure Code, and I do not think it can have been the intention of the Legislature to tie the hands of Subordinate Magistrates, and especially Sub-Divisional Magistrates, in the manner contemplated by such a very strict interpretation of the section. Even allowing, however, that the proceedings of the Magistrate in the present case were irregular, I think the irregularity is cured by s. 537 of the Criminal Procedure Code, as the accused does not appear to have been in any way prejudiced in his defence by the action of the Magistrate. On the legal ground, therefore, this appeal must fail.

"The other ground taken by the appellant is that the evidence for the prosecution is untrustworthy. I am unable to agree in this view. The evidence of the prosecutor and of his nephew, Rukini, as to the voluntary payment in Falgoon, 1292 B. S., of the decretal amount by the judgment-debtors to the decree-holder (appellant) is corroborated by the certified copy of the decree, which bears an endorsement in what clearly appears to be the appellant's handwriting, to the effect that the decree has been satisfied. The appellant fails to show that this document came into the hands of the prosecutor in any other way than that alleged by the prosecutor, *viz.*, that he received it from the appellant; and, this being so, and considering that the handwriting of the endorsement so closely resembles the admitted handwriting of the appellant, I believe that the prosecutor is speaking the truth in saying that he had already paid the money when the appellant took out execution against him.

"On the whole, after careful consideration of the case, I have no doubt that the appellant has been rightly convicted. The sentence is severe, but I am not prepared to say it is excessive. The appeal is dismissed."

The petitioner thereupon applied to the High Court under its revisional powers to send for the record and to set aside the conviction and sentence upon, amongst others, the following grounds:—

(1) That as the complaint of the complainant had been once dismissed under s. 203 of the Criminal Procedure Code, the

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Deputy Magistrate had no jurisdiction to entertain the complaint unless empowered by the High Court or Court of Sessions, or District Magistrate, in accordance with the provisions of s. 437 of that Code.

(2) That the Court of appeal had erred in law in holding that the said defect of jurisdiction was cured by s. 537 of the Criminal Procedure Code.

(3) That as the question raised on the merits related to the discharge or satisfaction of a decree, and as the complainant, the judgment-debtor, did not admittedly raise this objection in the execution department, the Courts below had erred in law in having recognised such alleged private adjustment, and in having allowed him to adduce oral evidence on that point.

(4) That the learned Judge having granted sanction ought not to have heard the appeal under s. 487 of the Criminal Procedure Code.

Upon that application a rule was issued which now came on to be heard.

Mr. *M. Ghose* and Baboo *Kashi Kant Seal* for the petitioner.

Baboo *Surendro Nath Mutty Lall* for the opposite party.

The judgment of the High Court (MACPHERSON and TREVELYAN, JJ.) was delivered by

TREVELYAN, J.—Two main questions have been argued before us. In the first place it is contended that the Judge had no jurisdiction to entertain the appeal, and secondly that no offence had been committed.

The first question turns upon the construction of s. 487 of the Code of Criminal Procedure. The Sessions Judge who tried the case, Mr. Cameron, had given sanction for the institution of the charge. The charge was one under s. 210 of the Indian Penal Code for causing a decree to be executed against the complainant after it had been satisfied. The Munsiff had refused sanction; the Judge had given it. A prosecution was accordingly instituted, and the case was heard by a Deputy Magistrate, and then came up on appeal before the Judge who had given sanction.

Section 487 provides that, except as provided in certain of the preceding sections, no Judge of a Criminal Court or Magistrate

other than a Judge of the High Court shall try any person for any offence referred to in s. 195, when such offence is committed before himself or is brought under the notice of such Judge or Magistrate in the course of a judicial proceeding.

In the first place there can be no doubt, we think, that the trial of an appeal is included in the expression "shall try any person." The offence which is charged was undoubtedly an offence referred to in s. 195, and the offence charged here is one of the offences mentioned in that section. The only real question as to the applicability of s. 487 is, whether the offence was brought under the notice of this Judge in the course of a judicial proceeding.

With regard to that there can be no doubt that the hearing of the appeal from the order refusing the sanction was a judicial proceeding within the meaning of the Code of Criminal Procedure. That Code defines "judicial proceeding" as any proceeding in the course of which evidence is or may be legally taken. On the appeal from the order of the Munsiff refusing sanction, the Judge undoubtedly had power to take evidence, and therefore it was a judicial proceeding, and it was in the course of that proceeding that the offence was brought under his notice, because the appeal was with reference to the refusal to sanction the prosecution. When that offence is established, s. 487 applies, and the Judge had no jurisdiction to entertain the appeal.

With regard to the second objection, inasmuch as there will be a fresh trial, we think it undesirable to prejudge the question now. It will be open to the defendant to argue it when the appeal is heard and all the facts have been gone into (1). Under the circumstances we think it would be better that the appeal should be heard in this Court, and we direct that it be so heard, and that notice thereof be given to both parties and to the Magistrate. The prisoner to be released on bail to the satisfaction of the Magistrate pending the hearing of the appeal.

H. T. H. *Rule made absolute.*

(1) See next case.

CRIMINAL APPEAL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

1888 December 18.

MADHUB CHUNDER MOZUMDAR v. NOVODEEP CHUNDER PUNDIT.*

Penal Code (Act XLV of 1860), s. 210—Civil Procedure Code (Act XIV of 1882), s. 258—Satisfaction of decree—Execution of decree—Fraudulently executing decree after it has been satisfied when satisfaction has not been certified to Court.

A decree-holder having proceeded to execute his decree against his judgment-debtor, the latter objected, stating that the decree had been already satisfied, although the adjustment thereof had not been certified to the Court as required by s. 258 of the Code of Civil Procedure. The judgment-debtor, being under the circumstances compelled to deposit the amount of the decree in Court, applied for and obtained sanction to prosecute the decree-holder for an offence under s. 210 of the Penal Code. It was contended that the case did not fall within that section, as the satisfaction, not having been certified to the Court, could not be recognised by the Court executing the decree, and that consequently no offence had been committed.

Held, that the words "after it has been satisfied," used in s. 210 of the Penal Code, indicate only the *fact* of the satisfaction of the decree. The fact that the satisfaction is of such a nature that the Court executing the decree could not recognise it, does not prevent the decree-holder from being properly convicted of an offence under that section.

THIS was an appeal from the order of a Deputy Magistrate convicting the appellant and sentencing him to rigorous imprisonment and a fine, which came on to be heard by the High Court under the circumstances stated in the preceding case—[*In the matter of Madhub Chunder Mozumdar*, petitioner (1)].

The facts of the case are fully stated in the report of that case.

Mr. *M. Ghose* and Baboo *Kashi Kant Sen*, for the appellant.

Mr. *Kilby* for the Crown, appeared in support of the conviction.

* Criminal Appeal No. 852 of 1888, against the order passed by D. Cameron, Esq., Sessions Judge of Tipperah, dated the 31st of August, 1888, affirming the order passed by Baboo Bugola P. Mozumdar, Deputy Magistrate of Chaundpore, dated the 8th of August 1888.

(1) *Ante*, p. 121.

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The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The evidence has been placed before us, and we think that the conclusion to which the lower Court has come on that evidence is right. As regards the question of law which has been argued, *viz.*, that the present case does not come within the purview of s. 210 of the Indian Penal Code, because the satisfaction of the decree was of such a nature as could not be recognized by the Court executing the decree, we do not think that that contention is valid. The words of the section are: "Whoever fraudulently causes a decree to be executed against any person after it has been satisfied, &c." The words "after it has been satisfied" indicate, in our opinion, the fact of its satisfaction. Merely because the satisfaction is of such a nature that the Court executing the decree could not recognise it would not take the case out of the purview of the section. We therefore dismiss this appeal.

H. T. H. *Appeal dismissed.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

GUR BUKSH ROY *alias* GUR BUKSH SINGH (PLAINTIFF) *v.* JEOLAL ROY AND OTHERS (DEFENDANTS).*

1888 *December* 20.

Right of occupancy—Purchase by tenant of fractional share of proprietary interest, Effect of, on acquisition of right of occupancy—Beng. Act VIII of 1869, *s.* 6.

A tenant, who had commenced to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietary interest, and continued to occupy the holding as ryot till the 13th May 1885, when he was dispossessed. On the 30th March 1886 he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that owing to the purchase of the share of the proprietary interest he could not have acquired such right.

Held, that under Beng. Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued

* Appeal from Appellate Decree No. 1062 of 1888, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Bhaugulpore, dated the 24th of March 1888, affirming the decree of Baboo Bemola Churn Mozumdar, Munsiff of Beguserai, dated the 22nd of December 1886.

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to hold the land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding.

IN this suit the plaintiff sought to recover possession of some 4½ bighas of land, alleging that he held the same as tenant and had acquired a right of occupancy therein, and that the defendants had illegally dispossessed him therefrom.

He alleged that 7 bighas—made up of the 4½, the subject of this suit, and 2½ bighas, the subject of an analogous suit against other defendants,—appertained to mouzah Madhurapur and lay in a four-anna *putti* which had been divided by metes and bounds from the other *putti*, and were held by him under a settlement from the former malik, which took place in 1277, taking effect from the 1st Bysack 1278 (13th April 1871). The only question decided in the suit by the lower Courts amongst those in issue on the pleadings was whether the plaintiff had acquired a right of occupancy or not as claimed by him, and the only witness examined by the Munsiff in the case was the plaintiff himself. Upon his evidence the Munsiff dismissed the suit, holding that the plaintiff had not acquired a right of occupancy and could not therefore succeed.

It appeared that in 1285 (1878) the plaintiff purchased a half share in the proprietary interest of the mouzah in the name of his son, and that he had been paying the rent of the entire *jumma* to the several maliks, the collections being made by the putwaris of Raghu Nath, the former proprietor, prior to the purchase of the 8-anna share by the plaintiff, and since such purchase to the putwaris of the purchaser of the other half share and himself, there being only one collection. The suit was instituted on the 30th March 1886, the dispossession complained of being stated to have taken place on the 1st Jeyt 1292 (13th May 1885). Upon the above facts the Munsiff, without going further into the case, held that, as the plaintiff had not acquired a right of occupancy at the date of his purchase of the half share in 1878, he could not be held to have acquired such right at all, as he could not acquire such right as against himself. He accordingly dismissed the suit.

The lower Appellate Court affirmed that decree, and the material portion of the judgment of the Subordinate Judge was as follows:

"There is no doubt that plaintiff could not acquire a right of occupancy from 1278 to 1285, *viz.*, within a period of about seven years, so that at the time of the purchase of the half share of the malik the plaintiff had no right of occupancy. The question next to be seen is whether after the purchase of the proprietary interest (8 annas) of the malik the plaintiff could reckon the subsequent portion of his occupancy for the purpose of creating such right. I think, regard being had to the clear provision of s. 22 of the Tenancy Act, the plaintiff could not tack the period for the purpose of a right of occupancy. A ryoti holding merges in the proprietary interest after the purchase of the latter. A man cannot occupy the double character of landlord and ryot, or make a pretence of paying rent to himself for the purpose of acquiring a right of occupancy—*Lal Bahadoor Singh* v. *Solano* (1). The same principle applies if the holder of the landlord's fractional interest acquires an occupancy right. It is to be determined now whether the plaintiff, having no right of occupancy, is entitled to succeed. I think not. The present suit is not of a possessory character brought within six months, as provided in the Specific Relief Act; he has undoubtedly brought this suit upon title, and failing which he is not entitled to recover—*Debi Churn Boido* v. *Issur Chunder Manjee* (2); see also s. 87, cl. 3, Act VIII of 1885. It is true that under s. 89 of the Act no tenant shall be ejected from his tenure except in execution of a decree; but if the tenant has been out of possession, either legally or illegally, by the admitted landlord, the former must make out a title or right to recover lands from the owner thereof, and in this case the plaintiff has failed."

The plaintiff appealed to the High Court.

Dr. *Rash Behary Ghose* for the appellant.

Mr. *C. Gregory* and Baboo *Mahabeer Sahai* for the respondents.

The judgment of the High Court (MITTER and BEVERLEY, JJ.) was as follows:—

The question that we have to decide in this case is whether, upon the facts found by the lower Courts, the plaintiff has acquired a right of occupancy in respect of the land in dispute.

(1) I. L. R., 10 Calc., 45. (2) I. L. R., 9 Calc., 39.

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The facts of the case are these: The land in dispute lies within a four-anna divided *putti*. It lies wholly within that *putti*, that *putti* being divided by metes and bounds from the other *putti*. It is not stated in the plaint, but it appears from the deposition of the plaintiff who was the only witness examined by the Munsiff, that the land in dispute was let out to him from the beginning of the year 1278 or 1871. It further appears from that deposition that in the year 1878 he acquired by purchase a fractional share in the proprietary right of the *putti* itself. The present suit was brought on the 30th of March 1886, the plaintiff alleging dispossession by the defendants on the 1st Jeyt 1292, that is, some time in May 1885. Upon these facts the Munsiff, accepting them as established for the purpose of raising this question of law, decided that the plaintiff, after his purchase of a fractional share in 1878, could not acquire a right of occupancy. It is clear that if the Munsiff's view is not right the right of occupancy would be deemed to have been acquired by the plaintiff on the completion of twelve years possession, that is to say, some time in the year 1883.

The lower Appellate Court has referred to the provisions of s. 22 of the Bengal Tenancy Act; but, as shown above, if the Munsiff's view was not right, the right must have been acquired by the plaintiff under the old Act, namely, Beng. Act VIII of 1869. If after the Bengal Tenancy Act came into operation there was no such dealing with the property as would bring the present case within any of the clauses of s. 22, the provisions of that section would not be applicable; and there is no such case established by either party. Therefore we may put aside s. 22 altogether from our consideration. The question therefore is, whether under s. 6 of the old Act, namely, Beng. Act VIII of 1869, after the purchase by the plaintiff of a share in the zemindari, he could acquire a right of occupancy in the land in dispute if he continued to hold it after his purchase for twelve years from the date of the commencement of his holding. If after his purchase he was legally in possession of the whole of the disputed land as a ryot, and if the relation of landlord and tenant existed between himself on the one hand and the proprietors on the other, we see

no reason why, in the express words of s. 6, he should not be considered to have acquired a right of occupancy after completing his occupancy as a ryot for twelve years. The question of merger does not arise at all in this case. If he had been the proprietor of the entire zemindari, no doubt then in that case the question of merger would have arisen. But here the only right under which he held that share of the disputed land, which is not covered by the share of the zemindari interest which he purchased, was his ryoti title in respect of it. And therefore it must be considered that, unless that title was extinguished by operation of law, he continued to be a ryot in respect of the whole disputed land. We are not aware of any provision of law according to which his ryoti interest in respect of the whole of the disputed land would be extinguished by his purchase of a fractional share of the zemindari. In the case of *Jardine, Skinner & Co.* v. *Sarut Soondari Debi* (1) this question was considered both by the High Court (2) and their Lordships of the Judicial Committee. That was a suit brought by Rani Sarut Soondari to recover possession of a two annas eleven gundas share of upwards of 20,000 bighas of chur land. She was the owner of that fractional share of the zemindari in which the land in dispute in that case was situated. The claim in the suit was resisted upon two grounds: *First*, that under an ijara lease the defendants were entitled to retain possession of the land; and, *secondly*, that they had acquired a right of occupancy in the land because they held it as jotedars before the ijara was granted to them. The High Court was of opinion that the defendants' possession of the land in suit was not that of jotedars, but that they were in possession of it as ijaradars; and that Court further held that as ijaradars they could not create in themselves a right of occupancy. But the Court added that, "even if that were not so, it is impossible to say how the defendants could have acquired either a right of occupancy or a jotedari right in respect of an undivided share of an estate," that is to say, the Court was of opinion that, as the defendants were the ijaradars of a fractional share, and thus represented the zemindar as regards that share,

(1) L. R., 5 I. A., 164.; 3 C. L. R., 140.
(2) 25 W. R., 347.

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their possession as jotedars, even if it be accepted as true as against the owners of an undivided fractional share, could not confer upon them a right of occupancy. But the Judicial Committee on appeal were of opinion that this view was not correct. They said: "Their Lordships do not concur in the view thus expressed by the High Court to the effect that a right of occupancy cannot be acquired in respect of an undivided share of an estate."

We are, therefore, of opinion that, if the plaintiff's case as stated in the plaint and supplemented by his deposition be established, he would be entitled to a decree on the ground that he has a right of occupancy in the land in suit. But the Munsiff did not take the other evidence of the plaintiff or any evidence on behalf of the defendants. We, therefore, set aside the decrees of the lower Courts and remand this case to the Court of first instance for completion of the trial.

Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

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December 19.

SHEONATH DOSS (DECREE-HOLDER) *v.* JANKI PROSAD SINGH AND OTHERS (JUDGMENT-DEBTORS.)*

Sale in execution of decree—Civil Procedure Code, 1882, *s.* 294—*Decree-holder, Purchase by—Satisfaction pro tanto—Mortgagee not trustee for mortgagor in sale proceeds—Leave to bid at sale in execution when granted—Permission of the Court to decree-holder to buy—Practice.*

A mortgagee who has obtained a mortgage decree, and after obtaining permission to bid at the sale held in execution of such decree has become the purchaser, does not stand in a fiduciary position towards his mortgagor. *Hart* v. *Tara Prasanna Mukherji* (1) distinguished. A mortgagee in such a position, therefore, is at liberty to take out further execution for any balance of the amount decreed that may be left after deducting the price for which the mortgaged property was sold, and is not bound to credit the judgment-debtor with the real value of the property to be ascertained by the Court.

*Appeal from Order No. 360 of 1888, against the order of J. Tweedie, Esq., Judge of Shahabad, dated the 22nd of June 1888, modifying the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 24th of January 1888.

(1) I. L. R., 11 Calc., 718.

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The permission to a mortgagee to bid should be very cautiously granted, and only when it is found, after proceeding with a sale, that no purchaser at an adequate price can be found, and even then, only after some enquiry as to whether the sale proclamation has been duly published.

IN execution of a mortgage decree for Rs. 5,088, obtained by one Sheonath Doss against Janki Prosad and others, four bonds (the subject of the mortgage), which had been executed in favor of the mortgagors by third persons, were put up for sale and purchased for Rs. 685 by the decree-holder, who had obtained permission to buy at such sale. On the 27th January 1888 the third persons above referred to paid into Court Rs. 5,812 to the credit of the person or persons (whoever they might be) then entitled to the money under such bonds. The exact amount payable as principal and interest on such bonds on the 7th January 1887 amounted to Rs. 5,719. The decree-holder, subsequently to the sale in execution, assigned one of such bonds, of the value of Rs. 1,000, to a stranger for Rs. 300; and subsequently applied for further issue of execution against other properties of his judgment-debtors for the unsatisfied balance of his decree, contending that he had become by his purchase in execution the absolute owner of these bonds, and was still entitled to satisfaction of the remainder of the judgment-debt from his judgment-debtors. The judgment-debtors objected to the issue of further execution.

The Subordinate Judge of Shahabad held, on the authority of *Hart* v. *Tara Prasanna Mukherji* (1) that the decree-holder having become himself the purchaser of the bonds at the sale in execution of his own decree, was bound to prove that the property purchased by him had realized a fair amount; and that this question was one which the Court was bound strictly to enquire into before the decree-holder could be allowed to take out further execution; and under the circumstances of the case he eventually directed that execution should be stayed, and that the decree-holder would be at liberty, on application made for that purpose, to take out from the Court the sum of Rs. 5,812 deposited by the third parties above referred to, after giving notice to the person to whom he had assigned one of the bonds, part of the subject of his mortgage.

(1) I. L. R., 11 Calc., 718.

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The decree-holder appealed to the District Judge, who held that in common honesty all the decree-holder was entitled to was the amount due on the bonds on the 7th Feburary 1887, *viz.*, Rs. 5,719; but that as he had assigned to a stranger one of such bonds of the value of Rs. 1,000, that sum should be deducted from the Rs. 5,719, and the price for which it was so assigned, *viz.*, Rs. 300, should be added thereto after such deduction, making the value of the bonds on the 7th February to have been Rs. 5,019; and that as the judgment-debt amounted to Rs. 5,088, there remained only a sum of Rs. 69 due by the judgment-debtors. He therefore varied the order of the lower Court and found that there was due to the decree-holder Rs. 69 plus costs and interest up to realization.

The decree-holder appealed to the High Court.

Mr. *R. E. Twidale* for the appellant.—The judgment-debtors are only entitled to be credited with Rs. 685, and for the balance of the judgment-debt the decree-holder is entitled to issue out further execution. The lower Courts have not kept in view s. 294 of the Code of Civil Procedure, which lays down that the purchase-money is to be set off against the amount due under the decree and satisfaction entered up to that extent; and also were in error in holding that the money paid into Court by third persons should be taken in satisfaction of the appellant's decree.

The case of *Hart* v. *Tara Prasanna Mukherji* (1) has no application to a case of this kind.

Moulvie *Mahomed Yusuf* for the respondents.—The decree-holder, after purchasing at the execution sale, became trustee for the mortgagors, and held the bonds only subject to satisfaction of his decree. I rely on *Hart* v. *Tara Prasanna Mukherji* (1).

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.) was delivered by

BANERJEE, J.—The only question raised in this appeal, and the only question tried in the Courts below, is, whether the mortgagee, who has bought the mortgaged property at a sale in execution of a decree upon the mortgage bond, is at liberty to take out further execution for the balance of the amount decreed left after deducting

(1) I. L. R., 11 Calc., 718.

the price for which the property was sold; or whether he is bound to give the mortgagor, judgment-debtor, credit, not only for such price, but for the real value of the property sold to be ascertained by the Court; in other words, whether the mortgagee, by his purchase, became the absolute owner of the property, or took it in trust for the mortgagor. Both the Courts below have answered this question in favour of the mortgagor, and the lower Appellate Court has ordered execution to issue only for the balance left after deducting from the amount of the decree what it found to be the real value of the property sold. We think the decision of the Courts below is not right.

The rule deducible from *Downes* v. *Grazebrook* (1); *In re Bloye's Trust* (2); *Tennant* v. *Trenchard* (3); *Martinson* v. *Clowes* (4); and other cases bearing on the question which are referred to in White and Tudor's Notes to *Fox* v. *Mackreth*, is thus stated in Fisher on Mortgage, and other well-known text books, that neither the mortgagee, whether he claims under an ordinary power or under a trust for sale, nor his trustee, can buy the mortgaged property, unless, when the sale is made by the Court, he has obtained leave to bid, and if the mortgagee be a trustee he will not have leave to bid where the *cestui que trust* objects, unless attempts to sell to others have failed, and that the same rule applies to a pledgee. See Fisher on Mortgage, 4th Edition, p 458; Coote on Mortgage, 4th Edition, p. 257; Dart on Vendors and Purchasers, 6th Edition, pages 35 and 41.

In the second of the above cases Lord Cottenham explains the reason of the prohibitory rule to be this, that it would be improper to place a person in a situation in which his interest, as intending purchaser, might conflict with his duty to secure the highest price for the property to be sold; and in *Tennant* v. *Trenchard* (3) Lord Hatherley points out that, if the Court is satisfied that no purchaser at an adequate price can be found, then it is not impossible that the trustee might be allowed to make proposals and to become the purchaser.

(1) 3 Mer., 200.
(2) 1 Mac. & G., 488.
(3) L. R., 4 Ch. Ap., 537.
(4) L. R., 21 Ch. D., 857.

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The above rule is in perfect accord with reason and common sense. While it prevents the mortgagee from taking any unfair advantage of his position by prohibiting him to buy, it removes the prohibition, to prevent the very result it was meant to guard against, when that becomes necessary. But a hard and fast rule that the mortgagee can never become the purchaser is not only unnecessary but would be inexpedient, even in the interests of the mortgagor. In the case of *Warner* v. *Jacob* (1) it was held that the mortgagee selling was not in a fiduciary position towards the mortgagor, and in *Coaks* v. *Boswell* (2) under somewhat similar circumstances it was held that the leave to bid put an end to the disability to purchase under which the party may have laboured.

The decree-holder, under our Code of Civil Procedure, can only buy with leave of the Court, and when the mortgagee decree-holder has bought the mortgaged property with such leave, we do not find any reason or authority for holding that he takes the property in trust for the mortgagor.

The only authority referred to by the Court below and relied upon by the respondent in this case is the case of *Hart* v. *Tara Prasanna Mukherji* (3); but that case is clearly distinguishable from the present. There the question was not one between the decree-holder mortgagee and the judgment-debtor mortgagor, but was one between the decree-holder and other creditors of the judgment-debtor; and though in one place the rule laid down by the learned Judges is stated somewhat too broadly, the distinction pointed out above is clear from another part of the judgment where the reason of the rule is stated. "It would manifestly be inequitable," say the learned Judges, "to allow a mortgagee to buy in the mortgaged property at an auction for a sum far below its real value, and then to go on against other property of the mortgagor to the injury of the other creditors." This makes the distinction between that case and the present one perfectly clear.

Whilst we attach so much importance to the leave of the Court to the decree-holder to bid, and consider that it removes all

(1) L. R., 20 Ch. D., 220. (2) L. R., 11 Ap. Cases, 232.
(3) I. L. R., 11 Calc., 718.

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disability in him to bid, we deem it our duty to observe that such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given only after some enquiry, that the sale proclamation has been duly published. And if, after all, the mortgagor, judgment-debtor, is in any way injured, he has ample remedy provided for him in the Code. He can, under s. 294, question the propriety of the leave to bid, by showing, either that it was obtained by misrepresentation, or that it was granted through inadvertence and without the exercise of judicial discretion by the Court, and he can have the sale set aside under s. 311, or obtain compensation under s. 298 of the Code, according to the nature of the property sold.

The present may be a hard case; but if there was any real hardship, the respondent was not without remedy; and for aught we know he may still have his remedy. All we say at present is, that the decision of the Court below, so far as it goes, is incorrect, and that the application of the decree-holder for further execution should be granted, subject, of course, to any objections or proceedings that it may still be open to the judgment-debtor to take. The appeal must be decreed with costs.

T. A. P. *Appeal decreed.*

Before Mr. Justice Pigot and Mr. Justice Macpherson.

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CHUNDER COOMAR (ONE OF THE DEFENDANTS) *v.* HURBUNS SAHAI (PLAINTIFF) AND ANOTHER (DEFENDANTS).*

Benami transaction—Estoppel—Misrepresentation—Heir, when bound by the acts of ancestor—Mitakshara Law—Sale by a co-parcener, Effect of.

B purchased some property from *D* (a member of a joint Mitakshara family) in the name of his wife *K* with the object of concealing from certain persons that he was the real purchaser, and further lest, in the event of a dispute arising in respect of such property, which was heavily encumbered, his exclusive property might be prejudiced and attached with debt. After the death of her husband, *K* obtained a certificate of guardianship of her infant son *S*, in which she did not include this property, and in

* Appeal from Original Decree No. 247 of 1886, against the decree of Baboo Koilas Chunder Mookerji, Subordinate Judge of Shahabad, dated the 11th of September 1886.

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fact continued to treat the property as her own. During *S*'s minority, *C* the nephew of *D*, who was now of age, brought a suit for pre-emption against *K* in respect of this property, and obtained a consent decree under which he took possession. *S*, then, on attaining majority, instituted a suit against *C* for the recovery of the property, as the heir and representative of his father, on the ground that *K* was a mere benamidar. The defence taken by *C*, amongst others, was that *K* was the real owner he believed her to be.

Held, that on the authority of *Luchman Chunder Geer Gossain* v. *Kally Churn Singh* (1) it was a good defence, for, even on the assumption that the purchase was benami, *S* as heir of *B* was bound by the misrepresentation of the latter.

Held, also, that the sale by *D* as against *C* was bad under the Mitakshara law, inasmuch as it was an appropriation by him, without any partition, of part of joint family property.

THIS was an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. Hurbuns Sahai, the plaintiff, brought this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276 (15th October 1868), leaving the plaintiff, then an infant, and Ruttonjote Koer (defendant No. 2), his widow and mother of the plaintiff. The plaintiff alleged that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant Chunder Coomar's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote Koer, Lala Bhugwandut was the real owner. He further alleged that after his father's death, and while he was an infant, in 1875, the defendant Chunder Coomar brought an unfounded suit of pre-emption against Ruttonjote; and by compromise with her obtained a decree for the property on the 15th June 1875, and took possession of it. The plaintiff also alleged that he was the real owner; that his mother Ruttonjote Koer had no right to compromise the suit; that undue influence, threats and coercion had been used to induce her to enter into the compromise; and that the decree was obtained fraudulently and illegally. He prayed for a declaration to that effect; that the deed of compromise of 12th May 1875, and the decree of 15th June 1875, be set aside; that he be put in possession of the property; and for mesne profits. He offered to repay to Chunder Coomar the sum of Rs. 7,080-2-0, the amount alleged to have

(1) 19 W. R., 292.

been paid by him to Ruttonjote Koer under the consent decree in the pre-emption suit. The defendant Ruttonjote Koer did not put in an appearance, although duly summoned. Chunder Coomar alleged that he and his paternal uncle Juneswar Das were members of a joint undivided Hindu family governed by the Mitakshara law; that no division of any description had ever taken place between them; and that the property in dispute covered by the sale of 28th September 1866 was part of property acquired with joint family funds. He denied coercion, undue influence and fraud. His defence shortly was, that Ruttonjote Koer was the real owner whom he believed her to be, under the deed of 28th September 1866; that the decree of the 15th June 1875, as between the plaintiff and the defendant, was binding on the plaintiff; that, even if Ruttonjote Koer was no more than a mere manager for the plaintiff, her compromise was the act of a prudent manager and therefore binding on the plaintiff; that under no circumstances could the plaintiff recover inasmuch as the deed of sale of 28th September 1866 from Juneswar Das was a conveyance of part of the property of a joint Mitakshara family by one member of the family asserting it to be his own separate and distinct property; and that the sale was void as against him.

The Subordinate Judge found that neither undue influence nor coercion had been used, and that the case of fraud was false; that when Ruttonjote Koer applied for a certificate of guardianship to her son, the plaintiff, under Act XL of 1858, she excluded the property in suit from the list of properties which she had filed; that Lala Bhugwandut purchased the property in dispute in the name of his wife Ruttonjote Koer with the object of concealing the fact that he was the purchaser from the Maharajah of Dumraon, in whose service the Lala was, and whose relatives were the former owners, and further lest, in the event of any dispute arising out of this property, his exclusive property might be prejudiced and attached with debt. The Judge also found that Chunder Coomar, Purbhu Das, his father, and Juneswar Das were members of a joint Mitakshara family; and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family and managed the business of the house. He held that

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the sale of 28th September 1866 by Juneswar was valid; that Ruttonjote was a mere benamidar; and that everything that passed under the sale passed to Bhugwandut. He also found that the compromise of 12th May 1875 was, so far as Ruttonjote was concerned, *bonâ fide* for the benefit of her son, but held that the compromise could not bind the plaintiff.

The Judge, partially decreed the suit. He set aside the compromise and consent decree, and gave the plaintiff possession, but disallowed mesne profits.

Against this decree Chunder Coomar appealed to the High Court.

The *Advocate-General* (*Sir G. C. Paul*) and Baboos *Unnoda Prosad Banerji*, *Mohesh Chunder Chowdhry*, and *Tarapodo Chowdhry* for the appellant.

Mr. *C. Gregory* and Baboos *Guru Das Banerjee* and *Oukhil Chunder Sen* for the respondents.

The judgment of the Court (PIGOT and MACPHERSON, JJ.) was as follows:—

This is an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shahabad. The plaintiff brings this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276, leaving the plaintiff, then an infant, and Ruttonjote, his widow, and mother of the plaintiff. The plaintiff says that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote, Lala Bhugwandut was the real owner in the name of Ruttonjote. The plaintiff says that after his father's death, and while he was an infant, the defendant brought an unfounded suit of pre-emption against Ruttonjote in respect of this property, and by compromise with her obtained a decree for the property and took possession of it. He says that he was the real owner, that Ruttonjote had no right to compromise the suit, that the decree was obtained fraudulently and illegally; and he asks for a declaration to that effect, that he be put into possession of the property and for mesne profits; offering, if this Court think's fit, to repay to defendant the sum of Rs. 7,080-2-0, being the amount said to have been paid

by defendant to Ruttonjote under the consent decree in the pre-emption suit. The defence is shortly this: (*a*) Ruttonjote was the real owner defendant believed her to be. (*b*) The decree is as between plaintiff and defendant binding on plaintiff. (*c*) Even if Ruttonjote was no more than a manager for the plaintiff, her compromise was the act of a prudent manager and was binding on the plaintiff. (*d*) Under no circumstances can the plaintiff recover, inasmuch as the deed of sale from Juneswar was a conveyance of part of the property of a Mitakshara family, by one member of the family, under pretence that it was his own, and that the sale was void as against the defendant. These are the substantial points made by defendant in his written statement, though stated in a different order. He of course denies fraud, &c., in the decree. A description of the property claimed in this suit and of the manner and the dates of its acquisition is given in the plaint as follows:

1. That Baboo Dyal Singh, deceased, was the proprietor of the entire 16 annas of mehal Athur, pergunnah Bhojepur, to which the undermentioned mouzahs appertain.

2. That in accordance with the conditions specified in the taksimnamah executed by Baboo Dyal Singh, in the mehal aforesaid, 6 annas came into the possession of Baboo Rip Bhunjun Singh, 5 annas into that of Baboo Goman Bhunjun Singh, and 5 annas into that of Baboo Ari Bhunjun Singh, sons of Baboo Dyal Singh.

3. That the entire 16 annas of the aforesaid mehal was mortgaged on behalf of Baboo Rip Bhunjun and Baboo Goman Bhunjun Singh for selves and as guardians of Baboo Rip Bhunjun Singh, minor, to Juneswar Das for self and as guardian of Baboo Chunder Coomar, and out of the mouzahs aforesaid appertaining to the mehal aforementioned, mouzah Athur, mouzah Kunhuan and mouzah Runbirpore were under two zurpeshgi leases, severally dated 17th February 1862 and 21st September 1860, in the possession of Baboo Juneswar Das for self and as guardian of Baboo Chunder Coomar.

4. That Juneswar Das, for self and as guardian of Chunder Coomar, obtained a decree on the basis of his mortgage bond, and caused the shares of Baboo Rip Bhunjun Singh and Baboo Goman

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Bhunjun Singh in mehal Athur aforesaid to be sold at auction, and purchased them himself on the 4th March 1865.

5. That after the purchase made at auction Juneswar Das, for self and as guardian for Chunder Coomar, held the entire 16 annas of mouzah Athur, mouzah Kunhuan and mouzah Runbirpore in possession under zurpeshgi lease, and entered into possession of 11 annas of the entire mehal by virtue of purchase at auction, and out of this one-half was the share of Juneswar Das, and the other half that of Chunder Coomar.

6. That out of half of the share which belonged to Juneswar Das under the zurpeshgi deed and the auction purchase one-fourth was sold by Juneswar Das to Lala Bhugwandut, father of the plaintiff, under the deed of sale dated 28th September 1866, and possession made over, and that Lala Bhugwandut got that deed of sale executed in the fictitious name of Mussummat Ruttonjote Koer, his wife.

7. That under the deed of sale above adverted to Lala Bhugwandut became proprietor and holder of 1 anna 4 pie 10 krants in the entire mehal Athur as auction-purchaser, and in that mehal in mouzah Athur, mouzah Kunhuan and mouzah Runbirpore he came to hold possession of 2 annas share under a zurpeshgi lease.

The Judge in the Court below held that the case of fraud, (which consisted of a charge of intimidating Ruttonjote by threatening her to kill her son by sorcery), was false. He held that the purchase in Ruttonjote's name was a benami purchase, and that everything that passed under the deed of sale passed to Lala Bhugwandut. He found that Purbhu Das, defendant's father, Juneswar Das, his uncle, and the defendant were members of a joint Mitakshara family, and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family.

We accept these findings as correct.

The Judge further held: (*a*) that the compromise and consent decree could not bind the plaintiff; (*b*) that, although the defendant's family were joint, Juneswar was, as to the property of which that in dispute was one-fourth, separate owner, and capable of giving a good title to it by sale; and (*c*) that even if he were not, defendant could not now insist on the defect of title, as he had

not made it a ground of claim when he instituted the pre-emption suit.

As to the first point, the Judge expresses no opinion upon the question whether defendant had, at the time he entered into the compromise, notice that Ruttonjote was a benamidar. The defendant wholly denies that he had; and we find, upon the evidence that there is no ground for finding that he had, and that the facts of the case are not such as to justify a Court in fixing him with constructive notice of the plaintiff's rights such as they were. Not merely was the purchase made in Ruttonjote's name, but the reasons for the use of her name by Lala Bhugwandut are given by the Judge. It was desired to conceal from the Maharajah of Dumraon, in whose service Lala was, that he had purchased property of persons who were the Maharajah's relatives; and there was the further very substantial reason that the disputed properties were heavily encumbered, as Sheo Gholam, witness No. 7, says: "He made the purchase in the name of Ruttonjote with a view that in case of dispute arising his exclusive property might not be prejudiced, and no liability in consequence of debt might attach to it," and then mentions also the consideration about the Maharajah.

It is plain that the concealment (assuming the purchase to have been a benami one) was intended to be effectual. There seems no reason to doubt that it was effectual. It is plain that after Lala's death the property continued to be treated as Ruttonjote's. She obtained a certificate of guardianship of her son under Act XL of 1858, but this property was not included in it. A number of exhibits have been put in showing that for years, and down to near the time of the pre-emption suit, the property was managed and proceedings relating to it conducted in her name. There is not a fact in evidence such as could be calculated to put a purchaser from her (supposing for the moment that the defendant was such) upon enquiry, save the fact that plaintiff was her son; and the fact that she had excluded the properties from the certificate of guardianship is probably a sufficient indication of the answer that might have been expected from her to an enquiry as to the ownership of the property.

Further, had the defendant known or suspected the ownership

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of the plaintiff, there seems no reason why he should not have made him a party to the suit. His mother was his guardian. She might have been enabled to defend the suit in respect of this property as his guardian. The Judge finds that the compromise was, so far as Ruttonjote was concerned, a *bonâ fide* compromise for the benefit of her son in respect of property which was then heavily encumbered; and this would have justified her as his guardian in what she did. On the whole, we see no reason to doubt that were the defendant in this case simply a purchaser for valuable consideration, he would be entitled to whatever defence *bona fides*, and absence of notice of plaintiffs' claim, would entitle him to. That such a defence would be, in such a case as this, complete is decided by the case in the Privy Council of *Luchmun Chunder Geer Gossain* v. *Kâlly Churn Singh* (1), where it was held, overruling the decision of this Court, that such a defence is good against an heir of the person who created the benami, even although an infant at the time, when, after the death of the ancestor, a sale is made by the benamidar, in breach of his trust, to a *bonâ fide* purchaser without notice, there being a continuing misrepresentation by the ancestor by which the heir is bound.

We can see no distinction in favour of the plaintiff between the present case and the case of a purchaser. If Ruttonjote was by the act of Lala Bhugwandut held out as the real owner, and so competent to make a good title on sale, she was at least as much so held out as such, as being competent to defend the title obtained by the sale—at any rate, as against a member of the vendor's family claiming that the sale was in derogation of that member's rights, and so was capable of entering into a compromise with him should she honestly think the title defective. No doubt the compromise may very possibly have been arranged before the suit was filed. There is nothing to suggest that this was the case with the preliminary *mowasibut* and *istashad* which long preceded the actual filing of the pre-emption suit. Nor should it be omitted from consideration that pre-emption is in fact a sale enforced by law, and that the price paid by Lala Bhugwandut was actually paid back to Ruttonjote.

(1) 19 W. R., 292.

The Subordinate Judge has said that the performance by Chunder Coomar of the preliminaries required by the Mahomedan law in a case of pre-emption do not appear to have been properly performed. That question was not before him save so far as it might bear on the question of fraud, which he has negatived; for he has found that the compromise was *bonâ fide* made by Ruttonjote so far as she was concerned, for the benefit of her son. If she had power to defend the suit, the decree is binding; if not, it is quite immaterial whether the preliminaries were performed or not in compliance with the strict Mahomedan law of pre-emption or whatever modification of it, if any, may apply amongst Hindus in this part of the country, where, by custom, the right of pre-emption exists amongst them. For these reasons we are of opinion that upon this point the Judge was in error, that the plaintiff is bound by the compromise and the decree in pursuance of it, and that on this ground alone the suit ought to have been dismissed.

We may observe that the case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) was not cited before us, nor is it referred to in Mr. Mayne's chapter on benami, nor in Mr. Woodman's Digest under that title (2); nor, so far as the reports show, does it appear to have been cited in any case in this Court. It is a decision of great importance, as showing that, in some cases, the heir of one who purchases benami may be bound as between him and a purchaser from the benamidar by that act of his ancestor, irrespective of any act or omission of his own whatever, and even although a minor when his ancestor's conduct was acted on by such purchaser.

Although our decision upon this point is decisive on the appeal, we think we should also decide the other question argued before us. Purbhu Das, Juneswar Das, and the defendant, who is the son of Purbhu Das, were members of a joint family living under the Mitakshara law. Juneswar Das died in October 1874. The date of the death of Purbhu Das does not appear, but from a deposition of Juneswar Das, made on the 19th August 1872 before the Subordinate Judge of Shahabad, put in in this case and marked

(1) 19 W. R., 292.

(2) It appears under title Estoppel—Estoppel by Conduct, case 168.—ED.

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Exhibit 22, it does appear that at that date Purbhu Das was alive—a fact which appears to have escaped the attention of the lower Court and of learned counsel in this. Purbhu Das had nominally renounced the world. The lower Court finds that, though it was given out that he had done so, he had not really done so, but managed the business of his house. The brothers appear to have become possessed of considerable means, to have bought a good deal of zemindari property, and to have been much engaged in law suits, which latter pursuit is referred to in the deposition above mentioned as though it were part of their business, as it possibly was.

But, while holding that the status of the family was joint, the Subordinate Judge holds that the kobala of September 1866 was valid under the Mitakshara law. He does so chiefly on the ground that Juneswar in that kobala recites that the original purchase at auction was made half for himself and half for Chunder Coomar, and in reliance on certain expressions used by Chunder Coomar in his evidence in this case, in his plaint in the pre-emption case, and in an objection filed by him on December 13th, 1877, all of which, he appears to think, bar Chunder Coomar from now disputing that the property was joint. We think the construction put upon these expressions by the Subordinate Judge is erroneous; but, were it otherwise, they could not have the effect he attributes to them. Chunder Coomar's evidence in this case, in which he explicitly sets up the joint character of the property, cannot on the face of it be taken as an admission of a fact which he comes into Court to deny, while the language used by him in proceedings to which plaintiff was not a party could not bind him towards the plaintiff, even if it contained, as we do not think it does, admissions on his part that the property was not joint; nor can the language of the kobala have the effect attributed to it, for Juneswar, if he was selling property which he had no right to sell, could not confer that right upon himself by asserting that he had it. It is not suggested that the money advanced on the zurpeshgi leases, or the money which was the consideration for the auction sale, were not joint family funds; and the property which passed under those transactions became clearly joint family property.

Then the fact that Purbhu Das was an active member, as the Judge found, of the joint family, and was so at the time of the kobala, which latter fact was not mentioned in argument before us, is conclusive. The family did not consist of two persons jointly interested in the family property, but of three persons so interested. We take the Judge's finding to negative the supposition that Juneswar was the manager of the family. But even if he was, this sale did not pretend to be made by him in that capacity; nor was there any family object to be gained by it. It was simply an appropriation by him, without any partition, of part of the family property. Nor does the doctrine lately introduced, that sons are bound by force of a pious obligation incumbent on them to make good the acts of their father, extend to nephews in respect of the acts of their uncle, or to brothers of the acts of brothers. No doubt the Mitakshara law has been a good deal worn away by the decisions of recent years, which it is our duty to follow. But we are not aware of any authority according to which the sale by Juneswar in the present case could be sustained.

We think that the plaintiff has failed to show a good title to the property claimed, and that on this ground also the suit should have been dismissed.

As to the view taken by the Subordinate Judge, that having regard to s. 13 of the Code of Civil Procedure and the case of *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (1), the defendant is not entitled to rely on this ground, as he did not put it forward when he brought his suit for pre-emption; we think it enough to point out that this suit is not between the same parties as the former suit. We should hesitate before holding that the bar arising from the acts of his father which, as we have decided, precludes the plaintiff from disputing Ruttonjote's right to compromise the pre-emption suit, had such an operation as to entitle him to treat it as if, for all purposes, it had been brought against him, and so to avail himself, against the defendant, of s. 13, Explanation 2 of the Civil Procedure Code. Were it necessary to deal with this question, we should have to consider the bearing upon it of the recent decision of the Privy Council in *Amanut Bibee* v. *Imdad Hossein* (2), decided

(1) I. L. R., 2 Calc., 152. (2) L. R., 15 I. Ap., 106.

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on March 16th of this year. But for the purposes of this appeal, it is needless to determine that question. If the plaintiff is estopped, he cannot recover, for that reason, in this suit. If he is not, defendant is not barred by s. 13 from showing that under the Mitakshara law plaintiff has no title; and in either case the suit must fail.

We should add that had we felt able to sustain the decree of the Subordinate Judge, we should have felt some difficulty in doing so without giving the defendant an opportunity of showing how far, if at all, the very great increase in the value of the property since the pre-emption suit is attributable to the paying off of incumbrances at that time affecting it by the defendant. It has admittedly doubled in value at the least.

We set aside the decree of the Subordinate Judge, and dismiss the suit with all costs here and in the original Court.

C. D. P. *Appeal allowed.*

Before Mr. Justice Pigot and Mr. Justice Rampini.

1888. *September* 4.

SARAT CHUNDER DEY AND OTHERS (DEFENDANTS 1 to 5) *v.* GOPAL CHUNDER LAHA (PLAINTIFF), AND OTHERS (DEFENDANTS 6 TO 10).*

Benami transaction—Estoppel—Persons claiming under person who creates the benami.

The mere fact of a benami transfer does not in itself constitute such a misrepresentation as to bind all persons claiming under the person who creates the benami.

O made a benami gift of his property to his wife *A*. The deed of gift was registered and purported to be made in consideration of the fixed dower due to *A*. There was no mutation of names; but *O* managed the property as *A's* am-muktar under a general power-of-attorney executed by her in his favor. On the death of *O*, *A* mortgaged the property. At a sale in execution of a decree obtained by the mortgagee against *A*, the mortgaged property was purchased by the defendants. On the death of *A*, *H* and *R*, the son and daughter of *A*, sold their shares in the property, which they had inherited from their father *O*, to the plaintiff. In a suit by the plaintiff against the defendants for a declaration of his right to the shares of *H* and *R*, and for partition.

* Appeal from Appellate Decree No. 1560 of 1887, against the decree of H. Beveridge, Esq., Additional Judge of 24-Pergunnahs, dated the 18th June 1887, reversing the decree of Baboo Karuna Das Bose, Munsiff of Sealdah, dated the 30th December, 1886.

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Held, that the acts of *O* were not such as to constitute an estoppel as against his heirs, and, therefore, the plaintiff was entitled to the relief he sought.

Luchmun Chunder Geer Gossain v. *Kally Churn Singh* (1) explained.

SUIT for declaration of title and partition.

Umed Ali Ostagar died on the 6th August 1879, possessed of considerable property, and leaving him surviving his widow Azru Bibi, Ahmed Hossein, Rohimunnessa and Bunnijan, his children by Azru, and a son Palkjan by a second wife who predeceased him. Some time before his death, on the 4th January 1878, Umed Ali by a deed, which purported to be a *hiba-bil-ewaz*, or a deed of gift in consideration of a sum of Rs. 11,361 due to his wife Azru in respect of her fixed dower, conveyed, amongst other properties, the property in dispute in this suit to Azru Bibi absolutely. There was no mutation of names; but Azru executed a general power-of-attorney in favor of her husband Umed Ali, who, under color of such authority, managed the properties as her am-muktar.

On the strength of this deed Azru Bibi, on the 22nd April 1880, mortgaged the properties covered by it to one Kalimuddin to secure the repayment to him of an advance of Rs. 2,000. The mortgage-deed was attested by Ahmed Hossein, who held a power-of-attorney from her sister Rohimunnessa, dated the 17th December 1879. The mortgage debt was not repaid, and Kalimuddin, in 1881, brought a suit against Azru Bibi on the mortgage in the Court of the Second Subordinate Judge of the 24-Pergunnahs, and obtained a decree on the 7th December of the same year. At an auction sale on the 15th May 1882 in execution of this decree, Khetter Mohun Dey and Grish Chunder Dey, the predecessors in title of the defendants Nos. 1 to 5, purchased the mortgaged properties, and obtained possession. Prior to the decree in the year 1881, Palkjan instituted a suit in the original side of the High Court for the administration of the estate of his father Umed Ali Ostagar. The sale in execution of the mortgage decree took place before the written statements, in which Ahmed Hossein and Rohimunnessa supported the *hiba*, were filed by them in Palkjan's suit.

(1) 19 W. R. 292.

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On the 4th May 1884 Azru died; and, on the 28th July 1885, Ahmed Hossein and Rohimunnessa, the son and daughter of Azru, sold their respective shares in the property in this suit, which they had inherited from their father Umed Ali Ostagar, to the plaintiff Gopal Chunder Laha, who took a conveyance of the same in the name of his servant Janoki Nath Chatterjee, defendant No. 10. On the strength of his purchase the plaintiff Gopal Chunder Laha, in December 1885, instituted a suit in the Court of the Munsiff of Sealdah for a declaration of his right to the said shares of Ahmed Hossein and Rohimunnessa in the property in suit, and for partition. He also prayed for the removal of a pucca wall erected by the defendants Nos. 1 to 5.

The material issues tried by the Court of first instance were:—Did Umed Ali make a valid gift of the property to his wife? Even if the gift be not valid, is not the plaintiff estopped from disputing its validity by the conduct of his vendors and their predecessors in title. There was no dispute as to the share the plaintiff would be entitled to if the *hiba* was declared invalid.

It was contended, on behalf of the plaintiff, that the deed of 4th January 1879 was a benami transaction; that it did not convey any estate in the property; and that, as against the defendants Nos. 1 to 5, the plaintiff was entitled to the shares of Ahmed Hossein and Rohimunnessa. It was also contended that the mortgage of the 22nd April 1880, to enforce which the suit of 1881 was brought, did not pass any interest in the property, and that, therefore, the defendants Nos. 1 to 5 did not acquire any interest in it under the sale of the 15th May 1882 in execution of the mortgage decree.

The defendants Nos. 1 to 5 contended *inter alia* that the *hiba* was a valid document, possession having been given under it to Azru Bibi, that the plaintiff was estopped by the conduct of his vendors and their predecessors in title from questioning the validity of the *hiba*, and that they were *bonâ fide* purchasers for value without notice.

The Munsiff found that there was no consideration for the *hiba*; that Umed Ali had proclaimed to the world that he had made a valid *hiba* of his property in favor of his wife Azru Bibi; that he had given effect to it by putting her into possession; that he had

allowed his wife to use her own seal in respect of the property; and that, as his wife's am-muktar, he led the world to believe that she was the real owner of the property. He also found that, after Umed Ali's death, Azru Bibi dealt with the property as her own. He further found that the defendants Nos. 1 to 5 were *bonâ fide* purchasers for value without notice, and the plaintiff's purchase was only an unconscionable bargain.

He held that the *hiba* as a deed of dower was invalid, but that it was valid and binding as a deed of gift, seisin having been given in accordance with the requirements of the Mahomedan Law. He also held that the plaintiff was estopped from questioning the validity of the *hiba* by the conduct of his vendors and their predecessors in title. Accordingly the Munsiff dismissed the suit.

The plaintiff appealed to the Additional Judge of the 24-Pergunnahs. The Judge agreed with the Munsiff in holding that the *hiba* was invalid as a deed of dower and as being without consideration; but, as he was of opinion that there was no evidence that Azru Bibi did get possession until after the death of her husband, he held that the *hiba* was also invalid as a deed of gift. Upon the question of estoppel, he found that Umed Ali did nothing beyond execute and register the deed of gift; that there was no evidence that Umed Ali had held out Azru Bibi to the world as the owner of the property, or that he had parted with possession of it. He, therefore, held that the conduct of Umed Ali fell far short of what was required to constitute an estoppel. He also held that neither Ahmed Hossein nor Rohimunnessa was estopped from disputing the *hiba*, and consequently the plaintiff was not. The Judge further held that the existence of the suit in the High Court, in which the validity of the *hiba* was in question, went far to disprove the plea that the defendants were *bonâ fide* purchasers for value and without notice. He accordingly allowed the appeal, and ordered the removal of the wall erected by the defendants.

Defendants Nos. 1 to 5 appealed to the High Court.

Mr. *Woodroffe*, Baboo *Nil Madhub Bose* and Baboo *Shib Chund Paul* for the appellants.

Mr. *Evans*, Baboo *Pran Nath Pundit* and Baboo *Okhoy Coomar Banerjee* for the respondents.

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The judgment of the Court (PIGOT and RAMPINI, JJ.) was as follows:—

The plaintiff sues as purchaser of the shares in certain property of Ahmed Hossein and Rohimunnessa, the son and daughter of one Umed Ali Ostagar, of whose estate the property in question formed part, and who died in the year 1879, leaving him surviving his widow Azru, Ahmed Hossein, Rohimunnessa, and Bunnijan, his children by Azru, and a son Palkjan, by a second wife. The defendants purchased the property, in which the plaintiff claims the shares of Ahmed and Rohimunnessa, at an execution sale, which took place on the 15th May 1882. The sale at which the defendant purchased this property was in execution of a decree in a mortgage suit brought by one Kalimuddin, the mortgagee, in 1881, and the decree in which was made in December 1881. The plaintiff says that the mortgage, to enforce which the suit of 1881 was brought, was ineffectual to pass any interest in the property, and that no interest in the property passed to the defendant under the sale on the 15th May 1882 in execution of the mortgage decree. The mortgage was entered into between Azru Bibi, the widow of the deceased Umed Ali Ostagar, and Kalimuddin. Azru claimed to be entitled to the property mortgaged under a *hiba* executed by her husband on the 4th January 1878, by which *hiba*, in consideration of the sum of Rs. 11,361, due to her in respect of her fixed dower, Umed Ali conveyed the property in question amongst other properties to her absolutely. On the part of the plaintiff, it is said that this *hiba* was a mere benami transaction, and conveyed no estate in the property, and that as against the defendants he is entitled to the shares of Ahmed and Rohimunnessa, inherited by them from their father. It has been held as a matter of fact by the lower Court that the *hiba* was a benami transaction. But it is contended by the defendants that the plaintiff cannot recover, claiming as he does under Ahmed and Rohimunnessa, on the ground that they, his assignors, were estopped from disputing the validity of the *hiba*, and that he in this case cannot dispute it. The case of *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) has been cited on behalf of the defendants. And apart from the principles laid down in that decision, which was a

(1) 19 W. R., 292.

decision of the Privy Council, the circumstance of Ahmed Hossein having attested the deed of mortgage to Kalimuddin is relied on as estopping him from questioning his mother's power to execute the document, and a power-of-attorney executed by Rohimunnessa, amongst others, in favor of Ahmed, on the 17th December 1879, is relied upon as having a similar effect as regards her.

As to Ahmed we are unable to hold that the mere witnessing by him of that document, *i.e.*, the mortgage, or his assent to the execution of it, can create an estoppel binding on him, unless it were apparent that when he witnessed the deed and assented to it, he did so with knowledge of the invalidity of the *hiba* to confer upon Azru, and the fact that Azru had no power to create, a good title as against him, of which knowledge on his part there is no proof. As regards Rohimunnessa, we need say no more than that we cannot consider the execution by her of the power-of-attorney above alluded to as having the effect attributed to it by the defendants. As to any other ground of estoppel affecting Ahmed and Rohimunnessa, it is true that in the proceedings on the Original Side of this Court in suit No. 601 of 1881, filed by Palkjan, for administration of Umed Ali Ostagar's estate, both Ahmed and Rohimunnessa did support the validity of the *hiba*, but there is nothing to show that their having done so, or their being about to do so, was ever communicated to the defendants by any one—certainly not by them. Indeed the defendant's purchase at the execution-sale took place before the written statements filed by them in the suit in this Court were presented by them.

Upon the whole, therefore, we do not find any circumstance in this case such as to justify us in holding (assuming it to be material) that Ahmed Hossein and Rohimunnessa were, by acts of their own, estopped from disputing as between them and the defendants the validity of the *hiba*, which is the source of their title.

The next question is whether in this case the decision of their Lordships of the Privy Council in *Luchmun Chunder Geer Gossain* v. *Kally Churn Singh* (1) is an authority which we can apply in this case, so as to hold that Ahmed and Rohimunnessa, as heirs of Umed Ali Ostagar, became estopped as to

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the *hiba*. Now in that case, there were circumstances which do not exist in the present: there had been a long course of public acts and declarations by Ubotar Singh, the grantor of the deed of sale to his wife Ulpa, in that case was held to have been a benami transaction; and, further, Ubotar Singh, during his lifetime, as far as possible, by transfer of possession and otherwise, did all that he could to cause his wife to bear towards the public the character of owner. In the present case there was nothing save, *first*, the execution of the deed; *secondly*, the registration of it; *thirdly*, the execution of a general power-of-attorney by Azru in favor of her husband; and, *fourthly*, the fact that a seal was made for her, to constitute acts of the kind relied on in the case before their Lordships. And of none of them, save the execution of the deed itself, is it shown that the mortgagee or the present defendants were informed and aware. Again, before the sale on the 15th May 1882, in the suit in which that sale took place, the validity of the *hiba* was impeached by Palkjan, the plaintiff in the original suit in the High Court. It is true that Palkjan's claim was dismissed: still the fact that that claim was made was one that we understand the Additional District Judge to hold ought to have put the defendants upon enquiry. And although it is true that at that time the proceedings in the suit in the High Court did not contain an express denial by Palkjan of the validity of the *hiba*, the fact that he at least contested its validity, and that in the schedule to his plaint in that suit he included the properties in the estate left by his father, the administration of which he sought, must have appeared to the defendant had he made enquiry. Further, it is to be noted that there was no mutation of name in respect of this property to that of Azru Bibi, and there is nothing in the case to show that up to the time of the death of Azru's husband, she had (save in having executed that purely formal document, the power-of-attorney, under color of which affected authority the property was managed, *i. e.*, really enjoyed by her husband) anything to do with the possession of the property or the enjoyment of any of its profits. Under these circumstances, we cannot hold that the Additional District Judge—either in determining, as he has done, that no estoppel was created, or in holding, as he has done, that the defendants do not occupy the position of *bonâ fide*

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chasers without notice—was wrong; and this absolves us from considering the further question, which we might, perhaps, have otherwise found it necessary to determine, *viz.*, whether, if Ahmed and Rohimunnessa were estopped from disputing the *hiba*, that estoppel would have been one binding on the plaintiff in the absence of proof of knowledge on his part of the circumstances that gave rise to it.

We may add that we share the regret expressed by the Additional District Judge in coming to this conclusion in such a case. We would further say that we are sensible of the great importance of carrying out to the full the principle of the decision of the Privy Council in the case above cited, but that case does not go so far as to decide that the mere fact of a benami transfer in itself constitutes such a misrepresentation as to bind all persons claiming under the person who creates the benami, and, however salutary it might be that such should be the rule of law, we cannot hold that such a rule exists.

We, therefore, affirm the decree of the Additional District Judge, save as to that portion of it which orders the defendant to remove the wall built by him, for which we can see no warrant. As to that we must reverse the decree of the Court below. The respondent is entitled to remove the wall if it is on his land, but he is not entitled to a decree compelling the defendant to remove it. In other respects the appeal is dismissed with costs.

C. D. P. *Decree varied.*

Before Mr. Justice Mitter and Mr. Justice Macpherson.

AUBHOY CHURN MAJI (ONE OF THE DEFENDANTS) *v.* SHOSHI BHUSAN BOSE AND OTHERS (PLAINTIFFS.)*

1888 *December* 12.

Appeal—Suit for Rent—Question as to amount of Rent—Sub-division of Tenancy—Rent receipts signed by one of several co-sharers—Bengal Tenancy Act (VIII of 1885), ss. 88, 153.

Several plaintiffs, co-sharers, sued two defendants to recover the sum of Rs. 78 odd for arrears of rent in respect of a tenure, the annual amount of rent payable being alleged to be Rs. 15. One of the defendants appeared

* Appeal from Appellate Decree No. 506 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 5th of January 1888, modifying the decree of Baboo Dukhina Churn Mozumdar, Munsiff of Diamond Harbour, dated the 20th of July 1887.

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and pleaded that the tenure had been some time previous divided by the principal plaintiff (who was the *kurta* of the family and collected the rent), and that after the division he had paid Rs. 7-8 per *annum*, being the rent in respect of his half of the tenure, to the *kurta*; in support of such payments he produced *dakhilas* or rent receipts signed by the *kurta*. The suit was dismissed by the Munsiff, but on appeal the Additional Judge gave the plaintiffs a decree for the amount of rent claimed less the amount proved to have been paid by the defendant who contested the suit, as shewn by the *dakhilas*. He held that the division had not been proved, and that the *dakhilas* did not amount to the written consent required by s. 88 of the Bengal Tenancy Act. The defendant appealed to the High Court, and at the hearing it was objected that, under the provisions of s. 153 of the Act, no appeal lay.

Held, that an appeal did lie, inasmuch as there was a question as to the amount of rent annually payable, the plaintiffs claiming Rs. 15 and the defendant alleging only Rs. 7-8.

Held, further, that the *dakhilas* or rent receipts did not amount to a written consent as required by s. 88 of the Bengal Tenancy Act, and that the decree of the lower Court must be upheld.

IN this case there were two defendants, and the plaintiffs sued to recover arrears of rent and for ejectment, alleging that the defendants held 5 bigahs of land at an annual rent of Rs 15; that they had not paid the rent from 1290 to 1293; and that there was a sum of Rs. 74 odd due to them on account of such rent, interest and cesses.

The defendant No. 2 alone contested the suit and pleaded that the original tenure had been sub-divided by the plaintiff No. 1, who acted as *kurta* of the family, and alone managed the property and collected the rent. He further pleaded that in respect of the 2½ bigahs of land, which had been allotted to him on the division, he had already paid the rent to plaintiff No. 1.

The other defendant did not appear or contest the suit. At the hearing of the case in the Court of first instance, the plaintiffs abandoned their claim for ejectment, and the only issues raised were: (1) Whether the defendant No. 2 had paid the rent as he alleged; and (2) whether the holding had been subdivided by plaintiff No. 1, and, if so, whether the division was valid.

The Munsiff found that the plaintiff No. 1 was the collecting agent of the plaintiffs, and that he had always granted *dakhilas*; that a division of the holding was effected by him in the way

alleged by defendant No. 2; and that the plaintiffs were bound by his acts. In proof of his allegation as to the payment of the rent in respect of his 2½ bigahs, defendant No. 2, in addition to other evidence, produced *dakhilas* purporting to be signed by plaintiff No. 1, which signature the latter denied. The Munsiff, however, found them to be genuine, and decided the first issue also in favor of the defendant.

Upon these findings the first Court held that the plaintiffs were not entitled to any relief and dismissed the suit with costs.

Upon appeal the Additional Judge reversed that decree. He agreed with the finding of the lower Court that defendant No. 2 had proved the payments of the rent alleged by him. On the other issue, however, he held in favor of the plaintiffs. The material portion of his judgment upon that point was as follows:—

"Defendant says Shoshi Bhusan made a separation in Choit 1291, and granted *dakhilas* accordingly, in which it was stated that defendant held 2½ bigahs at a rental of Rs. 7-8. I am not quite sure if this amounts to the written consent required by s. 88 of the Bengal Tenancy Act [see the case of *Gour Mohun Roy* v. *Anund Mundul* (1)]. But however that may be, I think that defendant's plea of separation must fail on the ground that Shoshi Bhusan alone granted the *dakhilas*. He is not the guardian of the minor plaintiffs, and I do not think that it is within the scope of a manager's authority to divide tenures or distribute rents. Shoshi Bhusan is not the *landlord* referred to in s. 88 of the Tenancy Act, but only one of the landlords. I think, therefore, that defendant is still bound to pay the rent of the whole tenure."

He accordingly gave the plaintiffs a decree for the rents of the tenure at Rs. 15 per annum less the payments proved to have been made by the defendant No. 2, as shown by his *dakhilas*, the decree being against both defendants.

Against that decree defendant No. 2 now appealed to the High Court.

Baboo *Karuna Sindhu Mukerjee* and Baboo *Jogendra Chunder Ghose* for the appellant.

Baboo *Bhobani Churn Dutt* for the respondents.

(1) 22 W. R., 295.

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At the hearing of the appeal a preliminary objection was taken that no appeal lay to the High Court.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

We think that in this case the preliminary objection taken to the hearing of the appeal should not prevail. Under s. 153, if there be a question as to the amount of rent annually payable by a tenant, then an appeal lies. In this case there was a question of that nature. The defendant (appellant before us) contended that the amount of rent payable annually by him was Rs. 7-8, and not Rs. 15 as claimed in the plaint. That being so, we overrule the preliminary objection. Upon the merits of the appeal it appears to us that the District Judge has disbelieved the oral evidence that was adduced by the appellant to establish that the distribution of the rent between himself and his brother was effected with the sanction of the landlord, and the District Judge was further of opinion that the rent receipts filed by the defendant appellant, which were genuine, did not amount to a written consent required by s. 88 of the Bengal Tenancy Act. In this view of s. 88 we concur. He adds that even accepting that the rent receipts are sufficient to bring the case within the purview of s. 88 of the Bengal Tenancy Act, still the receipts having been granted by Shoshi Bhusan, the *kurta* of the family, were not sufficient to bind the other members of it. I am not inclined to agree with the District Judge in that view, but he being of opinion that the oral evidence as to the sub-division of the rent and of the land of the original tenure with the sanction of the landlord is not trustworthy, and that the receipts did not amount to a written consent required by s. 88, it is immaterial to consider whether the act of Shoshi Bhusan, the *kurta* of the family, was binding in this respect upon the other members. We dismiss this appeal with costs.

H. T. H.

Appeal dismissed.

CIVIL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Beverley.

SHUTTRUGHON DAS COOMAR (PLAINTIFF) *v.* HOKNA SHOWTAL AND OTHERS (DEFENDANTS.)* 1889 *January 7.*

Right of Suit—Suit for compensation for wrongful seizure of Cattle—Cattle Trespass Act (I of 1871.)

A suit for compensation for wrongful seizure of cattle will lie in a Civil Court, the provisions of Act I of 1871 being no bar to such a suit.

Nomaz Mollah v. *Lall Mohun Tagadgeer* (1) approved of; *Aslem* v. *Kalla Durzi* (2), dissented from.

REFERENCE under s. 617 of the Code of Civil Procedure from the Second Munsiff of Midnapore.

The plaintiff brought this suit to recover from the defendants the sum of Rs. 24, being the amount of fine paid by him in releasing his cattle, which he alleged had been wrongfully seized and impounded by the defendants. The defendants contended that the provisions of Act I of 1871 were a bar to a suit for compensation for illegal seizure of cattle, and further that the seizure and detention of the plaintiff's cattle were not illegal and wrongful.

The Munsiff found that the seizure was illegal and wrongful and decreed the suit; but having regard to the conflicting rulings in *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (1) and *Aslem* v. *Kalla Durzi* (2), he made his judgment contingent on the opinion of the High Court, on the question whether the provisions of Act I of 1871 operated as a bar to the maintenance of a suit for compensation for wrongful seizure of cattle in a Civil Court.

No one appeared for the plaintiff.

Baboo *Karuna Sindhu Mookerjee* for the defendants.

The judgment of the Court (PIGOT and BEVERLEY, JJ.) was as follows:—

In this case there are two conflicting decisions, and the Small Cause Court Judge has very properly referred the case to us. The question is whether an action for wrongful seizure of cattle will lie

* Civil Reference No. 22A of 1888, made by Baboo Bhubun Mohun Gangooly, Second Munsiff of Midnapore, dated the 7th of September 1888.

(1) 15 W. R., 279. (2) 2 C. L. R., 344.

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in a Civil Court. Mr. Justice Mitter and Mr. Justice Maclean, in the case of *Aslem* v. *Kalla Durzi* (1), have held that it would not, the remedy by Act I of 1871 being, in the opinion of both those learned Judges, the only remedy available. On the other hand, in the case of *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (2), it was held by Mr. Justice Loch and Mr. Justice Ainslie that a suit would lie, notwithstanding the provisions of Act III of 1857, the similar Act then in force. That case does not seem to have been before the learned Judges who decided the case of *Aslem* v. *Kalla Durzi* (1) which was not argued. Under these circumstances, we must form our opinion by the light of those two cases, and upon such grounds as appear to us to exist upon a consideration of the statute. The peculiar remedy for the wrongful seizure of cattle, and the special limitation provided for it, are the same as existed under Act III of 1857, referred to in the case of *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (2). Such a remedy does not, we think, exclude the ordinary remedy which a man possesses under the law. It might be, as Mr. Justice Loch points out, a hard thing that a man, who has not been able to pursue his remedy under the summary Act within ten days, should, because that Act offered him that remedy, be barred from exercising a right which existed for him before. Therefore, agreeing with the decision in the case of *Nomaz Mollah* v. *Lall Mohun Tagadgeer* (2) we consider that this suit will well lie.

C. D. P.

(1) 2 C. L. R., 344. (2) 15 W. R., 279.

PRIVY COUNCIL.

MAHOMED ABDUL KADIR AND OTHERS (DEFENDANTS) *v.* AMTAL KARIM BANU (PLAINTIFF).*

P. C. 1888 *March* 20 & 23 *April* 19, 21 & 24 *June* 23.

[On appeal from the High Court at Calcutta.]

Acquiescence—Ratification of transfer of Property—Limitation Act (XV of 1877), s. 10—Trust.

A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. On the question, whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it; *Held* that, if the mother had exceeded her powers in executing the solehnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction; and the solehnama was upheld.

As to limitation, it was not to be inferred from the evidence that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters; and, therefore, s. 10 of Act XV of 1877 was inapplicable. So that, as regarded the property included in the solehnama, suits instituted in 1882 by the daughters would have been barred by time.

CONSOLIDATED appeals from two decrees (13th April 1885) following one judgment of the High Court, varying two decrees (20th November 1883) following one judgment of the Subordinate Judge of Dacca in two suits, heard together.

The suits out of which these consolidated appeals arose were brought on the 7th July 1882 by two sisters against their two brothers, each sister suing separately and including the other sister as a co-defendant. The suits were heard together, and in the Courts below one judgment was given in both, the claims resting on similar grounds. The sisters were now severally respondents in the two appeals preferred by the brothers.

* *Present:* LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

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The general question raised was, whether the respondents, daughters of a Mahomedan proprietor, deceased in 1845, were entitled to possession with an account of past profits of their respective shares in his estate against their two brothers, who, after the father's death, had received the rents and profits of the estate; the respondents having parted with the shares to the brothers by transfers which they now sought to have set aside.

The facts are stated in their Lordships' judgment.

On the death of the father Mahomed Idris Khan in 1845, the plaintiffs, their father's widow Khadija, mother of the latter, and two sons of the deceased by a former wife, also another daughter, represented on this record, became entitled to proportionate shares in his estate.

The question between the parties involved the right of Khadija's daughters to have set aside the following documents of transfer alleged to have been executed on their behalf. The first was a solehnama, or deed of settlement of disputes, dated 6th January 1847, executed by Khadija for herself, and as guardian of her then minor daughters, and by Abdul Kadir, the eldest son, on his own behalf, and on that of his then minor brother, and two other minor sisters.

The second was a daemi miras ijara, or perpetual hereditary lease, dated 26th August 1864, purporting to have been executed by a mukhtar, Pran Nath Chuckerbutty, on behalf of the sisters, now plaintiffs, in favour of their brothers, in consideration of receiving Rs. 600 a year each. This they did receive till 1881.

As to the plaintiff's right to have these instruments set aside, and to recover possession of their shares, and to have an account taken from the time of Mahomed Idris's death in 1845, the Courts below differed; the first Court holding that the instruments in question were binding on the plaintiffs, and that these suits were also barred by limitation; the High Court holding, on the contrary, that neither of these instruments had been established against the respondents, and that limitation did not bar the suits.

The High Court (FIELD and BEVERLEY, JJ.), as to the solehnama of 1847, were of opinion that Khadija's execution of it was not binding upon the minors: her interests being adverse to

theirs. As to the daemi miras potta, which purported to have been executed on 26th August 1864 by the mukhtar Pran Nath Chuckerbutty, the Court was not satisfied with the evidence of his having been duly empowered. That being so, the daemi miras potta must fall to the ground. The Court also held that, even if the authority to the mukhtar had been proved, the defendants had not shown that the sisters understood the transaction which the mukhtarnama authorized, or that they had proper advice before entering into the transaction, which was not for their benefit.

As regards limitation, the Judges were of opinion that, less than two years before the suits were brought, the defendants were, as agents and trustees on behalf of the plaintiffs, managing and in possession of the property, both before and after 1864. It was only when the plaintiffs endeavoured to obtain an increase of the Rs. 60 per annum each, that the defendants set up an adverse title based on the miras potta of 1864, of which instrument the plaintiffs were not aware till the month of Aughran preceding the institution of these suits; which, accordingly were not barred. The High Court directed an account of the plaintiffs' shares in Mahomed Idris's estate from the date of his death in 1845 to be taken.

On this appeal, Mr. *R. V. Doyne*, for the appellants, argued that the grounds on which the High Court had reversed the decision of the Subordinate Judge were insufficient.

The solehnama of 1849 had been executed by Khadija, as mother and guardian of her minor daughters, and the High Court had not drawn a correct inference from the evidence in finding that the daughters' interests had been injured. Whatever might have been urged at one time on behalf of the daughters against the instrument, their claim to set it aside could not be maintained after the lapse of twenty years from the time of their attaining full age. This long acquiescence amounted to a ratification by the daughters themselves. So also in regard to the daemi miras ijara of 1864, the plaintiffs had been for many years receiving the annuities for which it provided, and thus it was not a correct conclusion that the ijara must fall with the mukhtarnama.

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The plaintiff's knowledge of the nature of the then intended lease was established by the evidence, and the plaintiffs had not shown any sufficient reason for setting aside their own act. Again, the High Court had erred in considering the law of limitation to be inapplicable. The possession of the appellants as lessees under the ijara of 1864 for more than twelve years before the institution of these suits had been shown, and thus the suits were barred.

The High Court say that the appellants' possession and management rendered them agents and trustees on behalf of the sisters. But this is incorrect. In regard to the solehnama, at all events, by which the taluks were separated, the brothers had no charge whatever of the shares or interests of the sisters, each daughter had become entitled to her share, and the mother (not the brother) was her guardian. There was no trusteeship as between the brother and the sisters. The suits were barred by Act XV of 1877, unless it should be held that the provisions of s. 10, relating to trusts for specific purposes excepted them from the operation of the general law. But it was clear that no such trust was involved by the brothers having, as manager, collected rents; and money actually received by the managers for the plaintiffs' use must be sued for within three years: see Art. 62, which prescribed that period counting from the date of the receipt of the money. Reference was made to Arts. 109, 120, 123, 127 and 144. In order to constitute the manager a trustee within s. 10, the property must have been vested in him; but it was not vested in him, nor had he accepted any such trust. Reference was made to the introduction of this exception into the law of limitation; and Reg. III of 1793, Acts XIV of 1859, s. 2, IX of 1871, and XV of 1877, s. 10, were referred to. Also, it was not sufficient to show a bare fiduciary relationship. *Ahmed Mahomed Pattel* v. *Adjein Dooply* (1), *Kherodemoney Dassee* v. *Doorgamoney Dassee* (2), *Greender Chunder Ghose* v. *Mackintosh* (3), *Sarodapershad Chattopadhya* v. *Brojo Nath Buttacharjee* (4), *Manickavelu Mudali* v. *Arbuthnot & Co.* (5), *Arunachala Pillai* v. *Ramasamiya Pillai* (6), were cited in

(1) I. L. R., 2 Calc., 323.
(2) I. L. R., 4 Calc., 455.
(3) I. L. R., 4 Calc., 897.
(4) I. L. R., 5 Calc., 910, 915, 921.
(5) I. L. R., 4 Mad., 404.
(6) I. L. R., 6 Mad., 402.

reference to s. 10. Reference was made to Lewin on the Law of Trusts, Chap. XXX, s. 1, p. 863 ; Darby and Bosanquet on the Law of Limitation, p. 183.

Mr. *J. Graham*, *Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, argued that, in accordance with the judgment of the High Court, which was correct, neither the solehnama of 1849, nor the daemi miras potta of 1864, should be maintained against them. In regard to the former, the mother was not entitled to convey as she had purported to do, nor was she authorized by her position with reference to her daughters to convey ; and the transfer was in disregard of the interest of infants.

As to the miras potta, the finding of the High Court that there was no satisfactory evidence of the execution of the muktarnama authorizing Pran Nath Chuckerbutty to sign for the sisters, was correct. And both the Courts below had been right in finding that the nature of the transaction had not been explained to them as it should have been.

Again, the judgment of the High Court had correctly proceeded upon their opinion of the law of limitation being inapplicable. The collection of rents by the managing member of the family estates did, as soon as they were in his hands, constitute him a trustee on behalf of the sharers. He was liable to account to them in respect of their shares. He was their agent to collect for the family, and this relation once established, the liability to account followed.

As to what would establish a liability to account, reference was made to *Wall* v. *Stanwick* (1), *Hobbs* v. *Wade* (2), *Thomas* v. *Thomas* (3), *Hurrocomaree Dassee* v. *Tarine Churn Bysack* (4), *Durga Prasad* v. *Asa Ram* (5).

As to a suit against a managing member of a Hindu family, reference was made to *Obhoy Chunder Roy Chowdhry* v. *Pearee Mohun Gooho* (6).

(1) L. R., 34 Ch. D., 763.
(2) L. R., 36 Ch. D., 553.
(3) 2 K. & J., 79.
(4) I. L. R., 8 Calc., 766.
(5) I. L. R., 2 All., 361.
(6) 13 W. R., F. B., 75 ; 5 B. L. R., 347.

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As to the guardianship of the minor sisters, Macnaghten's Mahomedam Law, p. 62, and Tagore Law Lectures, 1873, p. 477, were referred to.

Mr. *R. V. Doyne* replied.

On June 23rd their Lordships' jugdment was delivered by

SIR R. COUCH:—These are consolidated appeals in two suits brought by the respondents respectively against the appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The respondents (the plaintiffs) are the daughters of Moulvi Mahomed Idris, who died at Dacca in December 1845, by his second wife, Khadija, who survived him. The appellants, Abdul Kadir and Abdur Rahman, are his sons by his first wife, Biju, who died before him. By her he had also two daughters, Amatulla and Amtal Rahman, who survived him. At the time of their father's decease the respondents were living with him at Dacca, and, almost immediately afterwards, they left Dacca with their mother Khadija, and went to live at the house of their maternal grandfather, and continued to live there until Khadija married again. From there, soon after her second marriage, the respondents were removed by their brothers and were taken to the house of the brothers in Sylhet, where they lived until 1864. At that time, they being about 22 or 23 and 20 or 21 years of age, respectively, arrangements were made by their brothers for their marriages, and they were taken to Dacca, and, 15 or 20 days after their arrival there, were married to their present husbands. From the death of Mahomed Idris the property left by him was managed by the elder brother, the first appellant, and apparently by the younger, the second appellant, also, after he came of age, and the brothers received the rents and profits of the property.

In each of the suits the plaintiff claimed possession of a 1 anna 15 gundahs share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by Mahomed Idris, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

There were two grounds of defence. One, as to properties called in the plaint taluks Nos. 3 and 4, was founded upon a solehnama, dated the 6th of January 1847, made between Abdul Kadir for himself and as guardian of his minor brother Abdur Rahman and his minor sisters Amatulla and Amtal Rahman, and Khadija for herself and as guardian of her minor daughters Amtal Karim and Amtal Kadir. By this, after reciting that there was a dispute in respect of the immoveable property left by Mahomed Idris, for settling the dispute between them the parties made an amicable settlement to the effect that out of the taluks which were left by Mahomed Idris, and detailed in a schedule, the taluk No. 3, Alum Reza, bearing a jamma of Rs. 1,293-3-8, and jammai land with nankur and khanabari (homestead land) appertaining thereto, and taluk No. 4, Asadar Reza, bearing a jamma of Rs. 1,400-11-11, with jammai land and nankur khanabari appertaining thereto in Joar Baniachung, Zillah Nabigunge, and two annas share of the houses described, were given in lieu of a sum of Rs. 11,250, with interest, on account of the dower of the deceased mother of Abdul Kadir and his minor brother and sisters which was due to them from their father, by Khadija on her own account and as guardian of her daughters, and the said property was made over to them; and taluk No. 9, Mahomed Manwar, bearing a jamma of Rs. 343-12-3, and the jammai land and nankur khanabari in proportion to the aforesaid jamma, and taluk No. 11, Mahomed Mansoor, bearing a jamma of Rs. 168-1-8, with jammai land and nankur khanabari appertaining thereto in Pergunnah Langla which were covered by the kabinnama of Khadija, were given to her by Abdul Kadir, and other land in the taluks mentioned, was divided by giving to Abdul Kadir and his minor brother and sisters 10½ sixteenths as their share, and to Khadija and her daughters 5½ sixteenths as their share.

The other ground of defence was that the plaintiffs having been married and settled to live permanently at Dacca, they made a proposal to the brothers to give them a daemi mirasi ijara for ever, at a permanently fixed jamma, of their shares of the properties left by their father, and the brothers (the appellants) agreed to take it on the condition of paying Rs. 100 a month, Rs. 50 being paid to each of the plaintiffs.

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Their Lordships will first take the case of the solehnama. It is dated the 6th of January 1847, and thus was made two years after the death of Mahomed Idris. It was found by the Subordinate Judge to have been executed by Najumul Hossein, the father of Khadija, and that he had power to execute it on her behalf. It was argued by the learned Counsel for the respondents that Khadija had no authority to convey the shares of her daughters. In the view their Lordships have taken, it is not necessary to give an opinion upon this question, and the learned Counsel for the appellants having been relieved from replying upon this part of the appeal, he has not been heard upon this objection. The Subordinate Judge was of opinion that Khadija had had the benefit of good and independent advice, but that the defendants had failed to prove that the solehnama was beneficial to the plaintiffs. He held, however, that the plaintiffs having allowed 20 years to elapse, even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court, on appeal from the decrees which he made, held that the transaction was not binding on the plaintiffs, especially in the absence of evidence to show that it was the best arrangement which could under the circumstances be made in their interest.

In their Lordships' opinion, the High Court, in deciding that the solehnama did not bar the right of the plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance with it. That Khadija took possession was proved by her having subsequently made an alienation of part of the property assigned to her. There is, indeed, no direct evidence as to what the brothers did with the taluks Nos. 3 and 4, but it may be fairly inferred that they did not treat them as part of the joint property in which the plaintiffs had shares, and that they received the rents of them as property which belonged only to themselves and their minor sisters. Assuming that Khadija had no power to transfer the plaintiffs' shares,

or that they might have had the solehnama set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. There was also the defence of the law of limitation. The High Court, in dealing with this, made no distinction between the taluks No. 3 and 4 and the other property. They said that up to a period less than two years before the institution of the suits the defendants were as agents and trustees in possession of and managing the property on behalf of the plaintiffs. This may have been the case after Khadija's second marriage and the plaintiffs being taken to the brothers' house, but there is no evidence that the brothers should be regarded as trustees for the plaintiffs at the time of the execution of the solehnama. Section 10 of Act XV, of 1887 is, therefore, not applicable, and it is unneccessary for their Lordships to put a construction upon this section. It appears to them, if it were necessary to decide it, that, as regards the property included in the solehnama, the suits are barred by the law of limitation.

The defence under the daemi miras ijara-potta, or perpetual lease, has now to be considered. The case of the defendants is that the plaintiffs executed a mukhtarnama, dated the 7th Bhadro 1271 (22nd August 1864), by which, reciting that they had inherited from their father 3½ annas share of the property named in it, and the same was being let out in perpetual miras ijara to the brothers Abdul Kadir and Abdur Rahman, they appointed Moonshi Pran Nath Chuckerbutty as a mukhtar for the purpose of signing their names on the perpetual miras ijara-potta and causing registration of the same. And that, on the 26th of August 1864, Pran Nath Chuckerbutty signed their names to a daemi miras ijara-potta of the taluks mentioned in the schedule to it, at an annual rent of Rs. 1,200, namely, Rs. 600 on account of the share of each, to be paid by instalments of Rs. 600, and the document was registered.

There is now no dispute as to the execution of the potta by Pran Nath Chuckerbutty. The material question is whether the mukhtarnama was executed by the plaintiffs. It is attested by five witnesses, of whom only two were examined, and the absence of the others was not in any way accounted for. Of one

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of the witnesses examined, Chamu Bibi, the Subordinate Judge said: "I find it difficult to believe that she could, without any assistance, recollect the execution of the mukhtarnama so circumtantially as it was described by her. It seems to me as very probable that her knowledge of the details was not derived entirely from her memory. That circumstance, together with the dependence of the witness on the defendants, makes her evidence unreliable, unless corroborated by other evidence." The other witness, Masudar Reza, had been in the service of the defendants for many years, but had left it five or six years before the trial, and did not appear to have then any connection with them. He said: "The Bibis put their marks on that mukhtarnama. I saw the aforesaid Bibis putting their marks. Remaining behind a screen they put their marks by extending their hands. I saw it. From respectable people there I ascertained and believed that the aforesaid Bibis put their marks. I do not recollect the names of the persons from whom I ascertained it." This witness is described in the attestation as resident of Kumartoli, and one of witnesses not examined is described as inhabitant of Kumartoli in Dacca. The potta is attested by nine witnesses, three of whom are described as of Kumartoli, and others as being at Dacca. If the mukhtarnama was really executed as described, it is singular that it was not attested by some of these persons or of "the respectable people there," of whom Masudar Reza spoke.

The other evidence to prove its genuineness consisted of an order, dated the 22nd of August 1864, signed by Mr. Pennington, Principal Sudder Amin, on the back of the mukhtarnama, stating that it had been produced "to-day" by Moonshi Giasuddin, Mohurir, and, as an inquiry was necessary, ordering the Nazir to make it; and a report of the Nazir, also on the back of it, dated the 23rd of August, which stated that he went to the residence of the plaintiffs, and that they were identified by their relations Khaja Abdulla, Khaja Abdul Wajed, and Khaja Abdul Nubbi, and admitted the execution of the mukhtarnama and agreed to its terms. Mahomed Yusuf, the Nazir, was examined, and said he did not recollect anything about the inquiry, and that the signature at the foot of the report resembled his writing,

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but he could not swear it to be genuine or not. On the next day, the 23rd, the mukhtarnama was ordered to be given back to the man who presented it, namely, Giasuddin. As Principal Sudder Amin, Mr. Pennington had no authority to order the inquiry to be made. Giasuddin was a Mohurir of the Court of the First Subordinate Judge and general mukhtar of the defendants, and Mr. Pennington may have thought that the mukhtarnama was for business in the Court. The High Court properly held that the report was not by itself evidence of the facts stated in it. Khaja Abdulla and Abdul Wajed were examined. On the testimony of the former the Subordinate Judge said he placed little reliance. The latter deposed to seeing rent being paid and received on twelve or fourteen occasions, and that receipts were granted for it, and he saw them signed. It was said by Khaja Abdulla that Pran Nath Chuckerbutty was present when the mark signatures were put and when the Nazir made the inquiry, and yet he was not called as a witness, although he appeared to be living and might have been examined. Their Lordships are not satisfied that the Nazir ever made the inquiry.

It remains to notice a fact which, though possibly consistent with the truth of the defendants' case, raises a strong suspicion against it. A number of receipts were produced by the defendants appearing to be given by Amtal Kadir each for sums of Rs. 50. They contained a statement that she had given a lease in perpetuity to her brother Abdul Kadir and others in lieu of a salary or allowance of Rs. 50 as malikana money, and acknowledged the receipt of Rs. 50 as allowance for the month mentioned in the receipt. They seem to have been worded so as to support the case set up in the defendants' written statement. They were rejected by both Courts as not genuine. No other receipts were produced, nor any accounts showing that rent had been paid to the plaintiffs. Thus Abdul Wajed's evidence as to receipts being signed appeared to be false. The High Court, differing from the Subordinate Judge, said they were not satisfied that the defendants had succeeded in proving the execution of the mukhtarnama, and the evidence does not satisfy their Lordships that it was executed.

The Subordinate Judge found that certain properties in one of the schedules to the plaint did not appear to be covered by

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the miras potta, and he gave the plaintiffs a decree for those properties with proportionate costs, and dismissed the suits as regards the remainder of their claims. The High Court reversed that decree, and declared that, in addition to the shares of the properties decreed to the plaintiffs by the lower Court, they were entitled to shares of the remaining properties other than the taluks Nos. 9 and 11, which were allotted to Khadija by the solehnama, and had been sold and were in the possession of persons who were not parties to the suits, and they were also entitled to shares of such property or properties specified in the second schedule to the plaint as upon the making of the inquiry thereinafter directed might be found to have been purchased out of the surplus profits of the properties other than the said two taluks, and to a share of the surplus profits of the properties in the first schedule, other than the said two taluks, from December 1845 to the date of delivery of possession, and they ordered accounts to be taken from that date. As to the accounts, it appeared that the plaintiffs had, up to November 1881, been receiving Rs. 1,200 annually. Their Lordships think the evidence of Abdul Wahed, the husband of Amtal Karim, shows that this sum was agreed to be taken as the plaintiffs' share of the profits, and was so received by them until they asked, in November 1881, to have their allowance increased, from which time they refused to receive it. Their Lordships, therefore, consider that the accounts decreed by the High Court should only be taken from November 1881. The result is that, in their opinion, the decree of the High Court should be varied by omitting therefrom the taluks Nos. 3 and 4, which were included in the solehnama, and ordering the accounts to be taken from November 1881 instead of December 1845. They will humbly advise Her Majesty accordingly. As to the costs of these appeals, they think the partial success of the appellants does not entitle them to the costs, and they order that the parties bear their own costs.

Decree varied.

Solicitors for the appellants: Messrs. *Wrentmore* and *Swinhoe*.

Solicitors for the respondents: Messrs. *Watkins* and *Lattey*.

C. B.

KALI KRISHNA TAGORE (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (DEFENDANTS).*

P. C. 1888 *April* 26, 27, & 28. *June* 23.

[On appeal from the High Court at Calcutta.]

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13,—Act IX of 1847—Alluvion.

To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this: as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided.

This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted.

Held, that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882, Civil Procedure Code.

APPEAL from a decree (4th March 1885) of the High Court, varying, on cross-appeals, a decree (20th August 1883) of the Subordinate Judge of the Backergunj District.

On this appeal the first question was whether, between the parties to this suit, there had been a hearing and adjudication of the matters now directly and substantially in issue. Both suits related to the ownership of land gained by alluvion of the river Arial Khan in the Backergunj District, between two river-bordering zemindaries,—the one, Nazirpur, belonging to the plaintiff, and the other, Saistabad, belonging to the second defendant. On these estates land was washed away by the river between the years 1830 and 1841, and afterwards, by its recession, five churs were formed separated by *dones*, or streams. It then was disputed to which zemindari part of them belonged, as being formations on the original site of the land lost by diluvion. Also the right of the Government to assess and settle new formations in the channel came into question.

Present: LORD WATSON, LORD HOBHOUSE, and SIR R. COUCH.

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In 1841, as the result of proceedings before the Special Commissioner of Murshedabad, a chur named Gopalpur was made over to Gopal Lal Tagore, then the owner of Nazirpur; and another chur, named Chatua, was made over to the owner of Saistabad. In after years the river Arial Khan made channels through both these churs; and the changes took place, which are described in their Lordship's judgment.

In 1860 a survey was made, under orders of the Revenue authorities, in pursuance of Act IX of 1847 (regarding the assessment of lands gained by alluvion or dereliction). Also, in 1868, the accretions were mapped in a Thak survey. Further formations by alluvion took place about 1871; and, in 1873, Muazzem Hossein took possession of a portion which he alleged to be an accretion to his chur Chatua. But the officers of the Diara Survey, taking a different view, measured it as excess land of Chatua, and it was represented in the Diara Survey map of 1881 as beyond the boundary of that mauza. On the 24th September 1879 Muazzem's claim to this was heard and rejected by the Superintendent of Diara Surveys, whose order was, on the 6th February 1881, supported by the Commissioner of the Dacca Division, it being found that the newly-formed lands claimed by the owner of Chatua were not accretions to it, or part of it. Muazzem then, without resorting to the Civil Courts to dispute the order of the Revenue Courts, accepted a settlement of the land as in excess of Chatua; and an amulnamah was granted by the authorities enabling him to receive the rents of the cultivators located on it.

Meantime, the plaintiff, who was not a party to the proceedings taken by the Diara Survey officers, filed a suit (No. 1 of 1881), in the Court of the Subordinate Judge, against Muazzem, claiming the land as a formation on the original site of land lost by diluvion from his chur Gopalpur. He alleged that it had appeared gradually since 1873, having become cultivable since 1877. For his defence Muazzem, besides alleging that the land was an accretion to his chur Chatua, insisted that it could not be decreed to the plaintiff as against the Government, through whom he had a title to the possession of the land measured as excess. The judgment of the Subordinate Judge

(23rd February 1882) was in favour of the plaintiff as to a portion of the disputed lands. He found that it was included in the Thak of 1868 as part of Gopalpur. Excepting the 300 bigahs marked D on a map made by an Amin of his Court, that being the land settled as the excess of Chatua, the decree was for the plaintiff. But as to plot D, his judgment was that so long as the order of the Superintendent of Diara Surveys, directing that this should be measured as excess of chur Chatua, remained in force, "the plaintiffs right to it must be held to be either extinguished, or in abeyance." The decree dismissed the suit as to this plot, and from that decree the plaintiff did not appeal. The defendant Muazzem appealed to the High Court, and his appeal stood over until it was heard along with the appeal in the present suit in March 1885. The plaintiff then filed the present suit (9th January 1883) against the Government, represented by the Collector of the District, the first defendant, and making Muazzem the second defendant. He claimed a declaration of his proprietory right in, and possession of, the 300 bighas (marked D on the Amin's map), as being "re-formation on the original site of land within his zemindari," describing it in para. 12 of his plaint by reference to the survey maps. He referred to his previous suit, No. 1 of 1881, and the exception of D. from the decree of 23rd February 1882; and he claimed mesne profits.

The defence of the Government was that the suit, contesting the proceedings of the Diara Survey officers, could not be maintained; and that the land in dispute belonged in fact to neither of the zemindars, having been formed by the drying up of a navigable *done* which existed during the time of the first survey. The defendant Muazzem alleged his right through the Government, as well as independently.

The Subordinate Judge was of opinion that the question had been determined in favour of the plaintiff by the decision of 23rd February 1882, and decreed the claim, save as to the 300 bighas (marked D on the Amin's map), with mesne profits, for three years, against Muazzem.

From this judgment both the zemindars (plaintiff and defendant) appealed to the High Court; but the Government did not

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appeal, and accordingly was made respondent in both appeals. The appeals were heard by a Division Bench (PIGOT and O'KINEALY, JJ.), together with the appeal in the suit No. 1 of 1881 by consent of parties, and one judgment (4th March 1885) was delivered in the three appeals, or in both suits. In the appeal in the suit No. 1 of 1881 the High Court was of opinion that the evidence was in favour of the plaintiff, and they dismissed the appeal.

In considering the present suit, the Judges observed that the first question was as to the effect of the decree in the prior suit, No. 1 of 1881; and in their opinion that decree defined the limit of the estoppel arising from the proceedings. Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the judgment was that a declaratory decree should be refused. The result was a decree dismissing the present suit.

On this appeal, Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* for the appellant argued that the High Court was wrong in holding that the decree of the Subordinate Judge of 23rd February 1882, in the suit of 1881, barred the present suit. In deciding that the plaintiff in the suit of 1881 had made good his claim to the land which was adjudged to him, the judgment had not so defined the quantity as to preclude the plaintiff's recovering what he now sued for, on his making proper parties to the suit; and the decree in that suit should have been read with the judgment on which it was based. Also, there was a difference in the issues now raised from those in the former suit, the Government being a party on the present record. A reference to the judgment showed at once that there had not been in the former suit any final decision against the plaintiff's claiming the lands now in suit, *viz.*, the 300 bigahs excluded from the decree in the former suit; because the reason given for the exclusion was that the order of the Superintendent of Diara Surveys, dated 24th September 1879, remained in force treating the land as excess lands. That order could be set aside in proceedings against the Government. There was, therefore, only the decision that the 300 bigahs (marked D on the Amin's map), could not be recovered in that suit. Neither of the respondents had raised

the question of estoppel in their written statements, nor had an issue on this point been framed, or disposed of in the Court of first instance.

Reference was made to Act XII of 1879, s. 6; and to the Civil Procedure Codes (Act X of 1877, s. 13, and Act XIV of 1882, s. 13).

It was also contended that the finding of the Subordinate Judge as to the *done*, or stream, in which the accretion was formed, not having been shown in the earlier maps as included within the plaintiff's land, was an error on his part.

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson* appeared for the first respondent, the Secretary of State for India in Council. They contended that the plaintiff's suit was barred by the decision of 23rd February 1882, as *res judicata*. The plaintiff had put forward in the present suit the same claim that he made in the former. The defence in the former suit was that it was for him to make the Government a party, as to the 300 bighas in question. The plaintiff, thereupon, should have applied for leave to make it a party or for leave to abandon that part of his claim which contravened the orders of the Diara Survey Superintendent and the Commissioner of the Dacca Division, with liberty to bring a fresh suit. He made neither the one application nor the other; and his suit, as to this part of his claim, was dismissed by a Court competent to give relief between the parties, or those who should have been made parties. No new circumstances had since arisen. The test was not whether there had been an adjudication, or not, upon a title then put forward; but whether, but for the plaintiff's own conduct, there would not have been an adjudication. They referred to the explanations, 2 and 3, under s. 13, Civil Procedure Code.

Mr. *J. D. Mayne* replied.

On a subsequent day (23rd June) their Lordships' judgment was delivered by

SIR R. COUCH—This is an appeal in a suit brought by the appellant against the Secretary of State for India in Council (represented by the Collector for the district of Backergunj),

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and Maulvi Syed Muazzem Hossein Chowdhry, to obtain possession of about 300 bighas of land (described as marked D in a map prepared by the Civil Court Amin in a previous suit) being re-formation on the original site of the plaintiff's zemindari, and to have it declared that the proceedings and orders in connection with the Diara Revenue survey of the disputed lands, by which the land had been attached as liable to be assessed for revenue, and a temporary settlement of it made with the defendant Muazzem Hossein Chowdhry, could not stand against the plaintiff's right, and were not binding on him.

The written statement of the Collector of Backergunj denied that the land in dispute was a re-formation on the original site of the plaintiff's land, and asserted that it was not included in the old Thakbust or Survey boundaries as plaintiff's estate. It also stated that the boundary between the plaintiff's land called Gopalpur, thakked in No. 1585, and the defendant Muazzem Hossein's land called Chatua, thakked in No. 1625, was not a line during the time of the Thakbust or Survey measurement, but a big and navigable *done* (or stream), the bed of which was the property of no individual, and as such was at the disposal of the Government under the present law ; that the land in dispute was formed by the drying up of the big and navigable *done* which existed at the time of the first survey between Gopalpur and Chatua, and as such was assessable as surplus under the existing law. Muazzem Hossein in his written statement relied upon the proceedings of the revenue authorities with regard to the diara as being final, and also claimed the land as re-formation on the original site of his lands.

The appellant and Muazzem Hossein are proprietors of two contiguous estates, *viz.*, Nazirpur and Saistabad respectively. Some time before 1842 considerable portions of these estates were diluviated by the river Arial Khan. On the re-appearance of the land, in the shape of five churs separated from each other by *dones*, resumption proceedings were instituted by the Government, but ultimately the churs were released, and an Amin named Sumbhu Nath was deputed by the Collector to make over to the proprietors the different portions of the re-formed land appertaining to their estates. In 1842 the Amin, after making a measurement

of the lands, prepared separate chittas and a sketch map assigning different portions of the land to the several proprietors. The lands assigned to the ancestor of Muazzem Hossein were named chur Chatua, and those released to the appellant's father, Gopal Lal Tagore, were called chur Gopalpur. Some years after, but it is not clear when, the river again changed its course, and, flowing through Chatua and Gopalpur, washed away portions of these two mouzas. In 1868 a Thak survey was made, and after that the river gradually receded towards the east, and is now flowing through the appellant's land of Gopalpur. The land in dispute, which the appellant claims, is the newly-formed land on the west of the river, in contiguity with the lands of Chatua. After this last re-formation the western portion of the land in dispute, together with some other land, was measured by the Diara Survey authorities in 1879 as excess lands of Chatua. Muazzem Hossein objected to this, and claimed the land as re-formations on the site of the diluviated land of his mouza Chatua. The objection being disallowed, instead of bringing a suit to set aside the order of the revenue authorities, he accepted a settlement of the land from the Government as an accretion to his mouza In 1881 the appellant sued him for this and other lands, and he pleaded that the land claimed was a re-formation of the diluviated land of Chatua, and also claimed to hold as before of the Government. An issue was settled, "whether the land in dispute is a re-formation on the site of the plaintiff's chur Gopalpur, or on the site of the land of chur Chatua, released to the defendant." The Court found this issue in favour of the plaintiff (the present appellant), but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside, "the plaintiff's right to the portion of the disputed land measured as surplus accretion to Chatua, and settled with the defendant, must be considered as either extinguished or in abeyance. Consequently the plaintiff is not entitled to recover it *now*." It was ordered that the plaintiff should recover possession of a portion of land described by reference to a map prepared by the Amin, excluding therefrom the portion covered by the plot marked by the Court as D in the map. This plot is the land which is the subject of this appeal.

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By the Act IX of 1847, "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction in the Provinces of Bengal, Behar and Orissa," it is enacted that the Government of Bengal, in all districts or parts of districts of which a revenue survey may have been completed and approved by Government, may direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey. In 1860 a survey was made under this Act.

It is said by the Subordinate Judge in his judgment in this suit that, on comparison of the Thak and Survey maps by the Civil Court Amin, it has been found beyond doubt that the land in dispute was then thakked as part of the plaintiff's mouza Gopalpur, and that the assertion of the defendants to the contrary was erroneous. And he held the map to be an admission by the Government of the plaintiff's title. It could not be disputed that it made a *primâ facie* case against the Government. However the case of the appellant was not rested only upon this admission. The proceedings in 1842 were put in evidence by him, and from an examination of these their Lordships have come to a conclusion in his favour. The decision of the Special Commissioner of Murshedabad and Calcutta, dated the 15th December 1841, contains a history of the proceedings for assessment of Government revenue on the five churs which appear to have begun in 1833. It is stated that the Collector decreed the case in favour of the Government, and, on an appeal from his decision, it was set aside by the Special Commissioner, and it was ordered that whatever accreted lands might, on investigation, be found to have accreted to the original site by the Government officers, should be released from the claim of the Government.

In October 1842 Sumbhu Nath, the Amin who, as has been stated, was deputed to make over to the proprietors the different portions of the released lands, made two reports, one relating to 14,359 bighas 14 cottahs 3 dhoors of land, and the other to 6,792 bighas 16 cottahs 6 dhoors. In the former of these reports

is the following passage:—" The measurement by Anund Chunder Mookerji and Joychunder Chatterji " (a measurement made in the year before the decree of the Special Commissioner), " shows that there were 20,391 bighas 13 cottahs of land inclusive of *done* in the five plots of chur. The lands in those five plots of chur, inclusive of khal and *done*, amount, by my measurement, to 21,152 bighas 10 cottahs 9 dhoors of land in all, and so there is an excess of 760 bighas 17 cottahs 9 dhoors of land measured by me in the five plots of chur." In the other report, where he speaks of the quantity of land being relinquished to other parties than the appellant's ancestor, Gopal Lal Tagore, he says " including khals and *dones*." Thus the *dones* appear to have been included in the plots. At page 61 of the record there is a document described as the measurement chitta of the lands in five plots of chur included in the Haria and Chaola rivers being the subject of dispute etween the Government and Gopal Lal Tagore in cases Nos. 1474 and 1555 pending trial.

In several places a *done* is mentioned as included in the quantity of land. In the Amin's sketch-map, which accompanied the reports, the *done* in question appears to run between Dag. 8 in the 3rd plot and Dag. 15 in the 4th plot, the latter being described as land of Nazirpur. The description of Dag. 15 in the chitta is " north of the lands formed by alluvion after diluvion of mouza Kala" (worm-eaten), " to which the appellants Kumla D" (worm-eaten), " and others named in the decree No." (worm-eaten) " are entitled east of Dag. 8, west of the *done* to the west of the 5th plot and south of the lands of Jharna Bhanga chur, 4th plot." Thus on the opposite side to where the *done* in question was situate, we have a *done* between the 4th and 5th plot given as the boundary, but, on the other side, Dag. 8, and not the *done*, is given as the boundary, and in the description of Dag. 8 it is said to be west of the 4th plot. In the summary at p. 84 of the land of Nazirpur, the zemindari of Gopal Lal Tagore, the total quantity, including the 4th plot, is given, and of this quantity all the plots, except the first, appear in a column headed " Waste land with *done*." It appears to their Lordships that in 1842 the whole of the land and water within the ambit

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of the five plots or churs was measured and released by the Government, and no part of the *dones* was reserved. The evidence of what was done at that time, instead of rebutting the evidence of the map of 1860, supports it. The finding of the Subordinate Judge, that the part of the *done* which in 1842 covered the disputed land was not given to any of the parties to whom lands were allotted by Sumbhu Nath, is, in their Lordships' opinion, opposed to the evidence.

The Subordinate Judge refused to make a decree against the Secretary of State, and made a decree, which was unnecessary, that the appellant should recover possession of the land of which possession was decreed in the former suit. The present appellant and Muazzem Hossein both appealed to the High Court, the latter having also appealed against the decree in the former suit. The three appeals were heard together. The appeal in the suit of 1881 was dismissed. In the other appeals the High Court did not give any judgment upon the facts. They said the first question was as to the effect of the decree in the suit of 1881; that the claim of the plaintiff in respect of the portion marked D in the map "was dismissed, that is to say, the relief prayed for by him in respect of it was not granted. Whatever were the reasons which led the Lower Court to take that course and not to grant the plaintiff any relief in respect of that portion of the property, the decree as it stands constitutes the record of the rights of the parties, and is the source that defines the limits of the estoppel arising from the proceedings. We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree, . . it must be treated as a decree binding as between him and the 2nd defendant, the effect being that there is no claim against the defendant in respect of that property." Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in s. 6 of Act XII of 1879, and s. 13 of Act XIV of 1882. It is, that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally

decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the defendant in respect of the property.

Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the High Court, having thus decided as to the estoppel, considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the appellant being, in their Lordships' opinion, entitled to more than a declaratory decree. The appeal of the present appellant to the High Court was dismissed, and that of Muazzem Hossein in this suit was allowed, the result being that the suit was entirely dismissed.

Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the plaintiff, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to make a decree awarding possession to the plaintiff of the lands mentioned in the 12th paragraph of the plaint with mesne profits for three years previous to the institution of the suit, and from that until the delivery of possession or until the expiration of three years from the date of the decree, whichever first occurs.

As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason

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for the costs of this suit in the Subordinate Court not being now awarded to the plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgment should have been given in his favour. Their Lordships will humbly advise Her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. R. Wilson & Co.*

Solicitors for the respondent the Secretary of State for India in Council. } The *Solicitor, India Office*, Mr. *R. T. Treasure.*

C. B.

P. C. 1888 *July* 21.

HAIDAR ALI AND ANOTHER (APPELLANTS) v. TASSADDUK RASUL AND OTHERS (RESPONDENTS).

EX-PARTE HAIDAR ALI.*

[On petition from the Court of the Judicial Commissioner of Oudh.]

Privy Council, Practice of—Practice relating to substitution of parties on revivor—Representative character to be ascertained by Lower Court.

On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of the Court below; which, also, should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below.

PETITION to revive an appeal from a decree of the Judicial Commissioner of Oudh, that Court having made an order (17th March 1888) rejecting a petition to bring on to the record certain persons alleged to represent parties deceased.

This petition related to an appeal to Her Majesty in Council, preferred by Haidar Ali and Fazl Ali, from a decree of the Judicial Commissioner. After the admission of that appeal, the present petitioner, on 1st December 1887, applied in the Judicial

* *Present*: LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

Commissioner's Court stating that two of the defendant-respondents, *viz.*, Ali Khan and Ikram Khan, had died, and asking that certain persons, whom he named, might be substituted for the deceased on the record; also that a guardian *ad litem* might be appointed for such of them as were minors. On notice being given of this petition, it was opposed by the defendants-respondents as barred by time. A relation of one of the minor heirs applied to be appointed his guardian *ad litem*; and also the Agent of the Court of Wards represented that the estate of one of the respondents, a minor, had come under his charge, under ss. 161 and 162 of Act XVII of 1876.

The Judicial Commissioner rejected the petition. He was of opinion that, after the admission of the appeal to Her Majesty, he had no longer any authority in the suit, his Court being, in his view of the matter, no longer competent for any judicial act relating to it.

On this petition, which stated the above facts, Mr. *R. V. Doyne* appeared. The application was to revive the suit against the persons named. The Court below could ascertain the facts as to their real relationship to the deceased parties.

Their Lordships' judgment was delivered by Lord HOBHOUSE :—

Their Lordships think it is quite imposible for them to make an order upon these materials for altering the record. They have not got the facts before them, and it is very inconvenient that those facts should be tried here. There ought to be some finding of the Court below. The usual course is as laid down in Mr. Macpherson's book. He says (page 241):—"Of course in such cases the proper evidence must be given of the representative character of the persons by or against whom the revivor is sought. The title is more generally established upon petition to the Court below, which thereupon makes any inquiries which it may deem necessary, and orders the petition and proofs to be transmitted to England for such order as the Judicial Committee of the Privy Council may think fit to make."

The Court gives its own opinion as to who are the parties proper to be substituted upon the record. It has been the practice, so far as their Lordships can recollect, for a great

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number of years; and they now must request the Judicial Commissioner to follow that which is the ordinary practice and to make a certificate or statement on which their Lordships can act.

Solicitors for the petitioner:—Messrs. *Barrow & Rogers.*

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APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Tottenham.

1888 *March 2.*

SYAMA SUNDERI DASSYA AND ANOTHER (PLAINTIFFS) *v.* JOGOBUNDHU SOOTAR (DEFENDANT).

Evidence—Thak-maps—Boundary—Title, question of.

The sole question for determination being a question of the boundary of two taluqs, the Judge hearing the case refused to give effect to a certain thak-map which had been prepared in 1859, and upon the face of which appeared what were admitted by the parties then owning the taluqs to be the boundary lines of the taluqs at the time; no evidence was given showing that these boundary lines had ever been altered.

Held, that the map was clearly evidence of what the boundaries of the properties were at the time of the permanent settlement, and also as to what they admittedly were in 1859.

SUIT for the recovery of possession of certain land. Plaintiff No. 1 alleged that he had purchased taluq No. 703 at an auction sale held under Act XI of 1859, and that he had been formally put into possession thereof by the Collector; he further alleged that he had sold an eight-anna share in this taluq to plaintiff No. 2; that he and his co-plaintiff had endeavoured to occupy these lands, but were prevented from so doing by the defendant who alleged that the land claimed did not belong to taluq No. 703, but to taluq No. 600; and that he was a howlatdar under the proprietors of this latter taluq.

The Moonsiff held that as the dispute was not one between two rival taluqdars, and as the defendant had failed to establish

* Special Appeal No. 2357 of 1886, against the decision of Baboo Bani Madhub Mitter, First Subordinate Judge of Dacca, dated the 18th August, 1886, reversing the decision of Baboo Nil Money Nag, Second Moonsiff of Munshigunge, dated 31st January, 1885.

his connection with the proprietors of taluq No. 600 or to show that he had been in possession for over twelve years, the plaintiffs were entitled to recover if they could show that the land belonged to taluq No. 703, and after finding that the land fell within the boundaries of taluq No. 703, as given in a certain thak-map produced by the plaintiffs which had been prepared in 1859, held that the land appertained to taluq No. 703 and gave the plaintiffs a decree.

The defendant appealed to the Subordinate Judge on the ground that the thak-map being the only evidence produced to show that the land fell within the boundaries of taluq No. 703, there was no evidence of title on which to give the plaintiffs a decree.

The Subordinate Judge found that the defendant was in possession of the lands in dispute, and that therefore the onus of proving title lay on him, and that he had failed to prove this, the thak-map being no evidence of title, it being at most only evidence of possession at the time of the preparation of the map, and no evidence at all that the lands formed portion of taluq No. 703 at the time of the permanent settlement; and on the authority of the cases of *Mohesh Chunder Sen* v. *Juggut Chunder Sen* (1) and of *Joytara Dassee* v. *Mahomed Mobaruck* (2) held, reversing the decision of the Moonsiff, that the plaintiffs had failed to establish their title. Plaintiff No. 1 having died, his wife and sole heir was substituted on the record in his place.

The plaintiffs appealed to the High Court.

Baboo *Rash Behary Ghose* for the appellants contended that the thak-map was cogent evidence as fixing the boundary of taluq No. 703, and as showing the land in dispute as being within the plaintiffs' taluq.

Baboo *Basanto Kumar Bose* for the respondent.

The judgment of the Court (PETHERAM, C. J., and TOTTENHAM, J.,) was as follows:—

We think that the Subordinate Judge has taken a wrong view of what is, or is not a question of title, and it is necessary that this case should be returned to him for retrial.

(1) I. L. R., 5 Calc., 212. (2) I. L. R., 8 Calc., 975.

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The suit is a suit brought by the purchasers at a revenue sale of a taluq against the holder of a neighbouring taluq, to recover possession of a piece of land which, he says, belongs to his taluq, and which the defendant says belongs to the owner of another taluq, under whom he holds. The only question to be tried is, whereis the boundary line between the two properties?

The plaintiffs, as I said just now, bought at a revenue sale, and the effect of that sale was to put them in the same position as that which the person occupied with whom the property was originally settled, that is to say, on default of payment of the revenue, the Government puts up for sale the whole estate out of which the revenue which had defaulted was payable, and the purchaser at such sale is entitled to get the whole of the settled estate which was sold for non-payment of the revenue. Well, the plaintiffs bought that, and the question which has to be decided is, what is the estate which had been sold, and that depends upon the position of the boundary between it, and the one next to it.

There is no dispute as to the title to the taluqs; it is admitted that the plaintiffs' are entitled to the one, and the defendant or his superior landlords to the other, and the titles do not come into question in any way; the only question as I said before is, where the boundary line is to be?

It appears that, in the year 1859, a thakbust survey was made and maps were prepared, and upon the face of these maps appear, what were admitted by the parties to be, the boundary lines of the various estates at that time, and if they were admitted to be so at that time, that is the strongest evidence that they were so at the time of the permanent settlement, because there is nothing to show that there has been any change in the physical features of the place, or the relative positions of the boundary lines, from that time, down to the time of the thakbust survey. So that the thakbust maps are clearly evidence to show what the boundaries of the properties are. No doubt, the boundary of a property may, in one sense, be said to be a question of title, because upon the question, where the boundary is, depends the question, which person is entitled to the property. But by title, within the meaning of the Acts, is meant the nature of a man's title, and not what lands he holds under that title. We

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think, therefore, that the Subordinate Judge was wrong in giving no effect to this thakbust map. It is not only evidence, but is very good evidence as to what the boundaries of the property were at the time of the permanent settlement, and also as to what they admittedly were in 1859.

Under these circumstances, we set aside the decision of the Subordinate Judge, and remand the case to him in order that he should reconsider the matter, giving effect to the thakbust map, and to the remarks which we have now made in this case. Costs will abide, and follow, the event.

T. A. P. *Case remanded.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson and Mr. Justice Tottenham.

1888 *August* 16.

LUCKHI NARAIN KHETTRY (DEFENDANT) *v.* SATCOWRIE PYNE (PLAINTIFF).*

Registration Act (III of 1877), ss., 23, 24, 76, 77—Limitation for registration or order of refusal of a document admitted for registration by Registrar —Denial of execution —Refusal to attend—Limitation for suit under s. 77 of the Registration Act.

No period is prescribed by Act III of 1877, within which a document which has been admitted for registration, may be registered, or within which the order of refusal by the Registrar to register the document must be made.

There is nothing in ss. 76 and 77 to compel the Registrar in cases where there has been no express denial of execution, but where the executant refuses to attend at his office, to make his order of refusal within the time limited for admission of execution by ss. 23 and 24. Limitation in respect of a suit under s. 77 begins to run from the date of such order. *Mukhun Lall Panday* v. *Koondun Lall* (1) and *Shama Charan Das* v. *Joyenoolah* (2) relied on. *In the matter of Buttobehary Banerjee* (3) dissented from.

THIS was an appeal from the judgment of Trevelyan, J., in a suit under s. 77 of the Registration Act III of 1877, to compel

* Original Civil Appeal No. 21 of 1888, against the judgment of E. J. Trevelyan, Esq., one of the Judges of this Court, dated the 15th June 1888.

(1) 15 B. L. R., 228; S. C., L. R., 2 I. A., 210; 24 W. R., 75.
(2) I. L. R., 11 Calc., 750. (3) 11 B. L. R., 20.

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registration. The facts of the case and the judgment of the Lower Court are reported in I. L. R., 15 Calc., p. 538.

Mr. *Hill* for the appellant.

Mr. *Pugh* and Mr. *Sale* for the respondent.

Mr. *Hill*.—The suit is barred by limitation. In cases where there is no express denial of execution, but a refusal to attend at the Registrar's office, the Registrar is bound to make his order of refusal within the time limited for admission of execution ; and limitation, in respect of a suit to compel registration, begins to run from the expiration of such period. The case of *In the matter of Buttobehary Banerjee* (1) is in my favour.

The cases of *Edun* v. *Mahomed Siddik* (2) and *Lakhimoni Chowdhrain* v. *Akroomoni Chowdhrain* (3) show that compliance with every provision of the Act is a condition precedent to the maintenance of a suit under s. 77. Refusal to attend is denial within s. 73 : *Radha Kissen Rowra Dakna* v. *Choonee Lal Dutt* (4) : but here there is no evidence of refusal nor subsequent enquiry under s. 74.

Mr. *Sale* for the respondent.—There is no period of limitation within which the Registrar is bound to make his order of refusal ; there is only a period of limitation within which a document must be presented for registration. The Registrar has assumed that the executant denies execution from his refusal to attend. The case of *In the matter* of *Buttobehary Banerjee* (1) is distinguishable from the present one. I rely on the case of *Shama Charan Das* v. *Joyenoolah* (5), which follows the case of *Mukhun Lal Panday* v. *Koondun Lal* (6), and is exactly in point.

Mr. *Hill* in reply :—The Privy Council case of *Mukhun Lal Panday* v. *Koondun Lall* (6) was decided under the Act of 1866. Between the Act of 1866 and the present Act there is a great difference. The former Act contained a period of limitation

(1) 11 B. L. R., 20.
(2) I. L. R., 9 Calc., 150.
(3) I. L. R., 9 Calc., 851.
(4) I. L. R., 5 Calc., 445.
(5) I. L. R., 11 Calc., 750.
(6) 15 B. L. R., 228 ; S. C., L. R., 2 I. A., 210 ; 24 W. R., 75.

as to registration, but none as to the time within which parties were to appear to admit. The present Act fixes a period for the appearance of parties.

The judgment of the Court (PETHERAM, C. J., and WILSON and TOTTENHAM, JJ.,) was delivered by

PETHERAM, C. J.—This is a suit brought under the provisions of s. 77 of the Registration Act, to compel registration of a deed. "The deed was executed on the 18th September 1886. It was presented for registration on the 12th January 1887 by the claimant, who applied for a summons against the executant. He was unable to serve the summons, and on the 30th August 1887, the Registrar refused registration, on the ground that more than eight months had elapsed."

So much I have taken from the judgment of Mr. Justice Trevelyan. The suit was commenced on October 28th, 1887, and the only defence has been that it is barred by limitation.

The statement by the learned Judge in his judgment of the ground of refusal is incomplete; because the statement on the face of the document of the ground for the refusal given by the Registrar is this: "Summons and warrant were issued, but could not be served on the party, as his whereabouts were not known to the claimant. As more than eight months have elapsed since the execution of the deed, and as the claimant has applied for return of the deed, registration is refused." We find then, that the reason given by the Registrar for the refusal was, that the applicant had been unable to obtain the attendance of the executant for the purpose of proving by his evidence the execution by him of the document, and that more than eight months had elapsed and the claimant had applied for the return of the document. And as I understand it, the Registrar, upon these facts, assumed or found, as a fact, that the alleged executant had denied execution of the deed, and he thereupon refused to register it. If that is so, then it comes to be a case in which the Registrar refused to register, because the execution of the deed is denied by the alleged executant; and this, in our opinion, brings the case within the meaning of s. 76 of the Registration Act.

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Several cases have been cited before us on the subject. The first case is that of *In the matter of the Registration Act 1871, and in the matter of Buttobehary Banerjee* (1). That case was decided by Mr. Justice Macpherson; and Mr. Justice Macpherson in that case undoubtedly did hold, that the time must be reckoned from the expiration of the four months, and that all the proceedings must be had within that period. The point involved in that case has been subsequently discussed in the case of *Shama Charan Das* v. *Joyenoolah* (2), which was decided by a Division Bench of this Court in the year 1885. Apparently on the argument of the latter case, the decision of Mr. Justice Macpherson, to which I have just referred, was not brought to the attention of the Court; and in considering the matter now, we must give it due consideration, It seems to us that the case *Shama Charan Das* v. *Joyenoolah* (2), and that in the Privy Council, *Mukhun Lal Panday* v. *Koondun Lal* (3), are directly in point, and are authorities in support of the view taken by the learned Judge in the Court below, and binding on us. But as Mr. Justice Macpherson, in the case cited, took a different view, we proceed to examine the provisions of the Act on the subject. The application to register in this case was made to a Registrar.

The sections which relate to this case are ss. 23, 24, 34, 35, 74, 76 and 77.

By ss. 23 and 24 the document must be presented for registration within four or eight months, as the case may be, and by ss. 34 and 35 the execution may within that time be proved by admission; and (s. 35) in cases in which such admission is not made, and the registering officer is a Registrar, he shall follow the procedure prescribed in Part 12 of the Act.

Sections 76 and 77 of Part 12 relate to refusal by the Registrar. Section 76 provides that, if the Registrar refuses to register for any reason but want of jurisdiction, he shall record the reasons for such refusal and make an order to that effect. No period is prescribed within which a document, which has been

(1) 11 B. L. R., 20,

(2) I L. R., 11 Calc., 750.

(3) 15 B. L. R., 228; S. C., L. R., 2 I. A., 210; 24 W. R., 75.

admitted for registration, may be registered, or within which the order of refusal must be made; but it is obvious, that the order of refusal must be made at some time *after* the expiration of the time allowed for admitting the document, except in cases in which there has been an express refusal. Section 77 provides that a suit to compel registration may be brought within 30 days from the making of the order of refusal; and the contention of the defendant in the present case amounts to this,—that in cases where there has been no express denial of execution, but where the alleged executant has refused to attend, the registering officer must make an order of refusal *within* the time limited for admission of execution, and that the 30 days mentioned in s. 77 will begin to run immediately on the expiration of such time. The law does not say so expressly, and we think it impossible to imply such a meaning, for (amongst others) the reason, that the order of refusal could not be properly made until *after* the expiration of the *whole* period limited for admission by the parties; and if it were made afterwards, and the period of limitation began to run at the expiration of the period limited for admission, it would begin to run from a time before that at which the action could have been brought. And it seems to us that the period of limitation can only begin to run when the order of refusal was made, at which time, and not before, the cause of action accrued.

On the whole then, both on principle and authority, we think the learned Judge in the Court below was right in the conclusion at which he arrived, and we dismiss this appeal with costs.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Sen & Co.*

Attorney for the respondent: Baboo *D. N. Dutt.*

C. D. P.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

1889 *Jan. 8th.*

DOORGA SINGH AND OTHERS (DEFENDANTS Nos. 1—4) *v.* SHEO PERSHAD SINGH AND OTHERS (PLAINTIFFS) AND ANOTHER (DEFENDANT).*

Sale for arrears of Revenue—Fraud—Bidders, Dissuasion of.

In a suit by some of the co-sharers in a mouzah against the others to set aside a sale for arrears of revenue, the finding of the Court of first instance established that a certain co-sharer in a mouzah had intentionally withheld the payment of a small arrear of Government revenue, and had thereby caused the property to be sold under Act XI of 1859, purchasing it himself at a small sum in the name of certain other persons; and had also dissuaded certain intending bidders from bidding at such sale:

Held, that the evidence did not warrant such a finding, but that assuming these facts to have been established, the right of the co-sharer to buy up the estate at the Revenue sale was not based upon any right or interest common to himself and his co-sharers, and that, in the absence of misrepresentation or concealment, the fact that he had intentionally defaulted as found, did not constitute fraud; nor did the fact, that he had deterred others from bidding for the property, necessarily constitute an act of fraud.

Bhoobun Chunder Sen v. *Ram Soonder Surma Mozoomdar* (1) distinguished.

THE plaintiffs, who were nine-anna shareholders in a certain mouzah, brought this suit to set aside a sale held for arrears of revenue on the 6th June 1883.

The defendants, Nos. 3 to 23, were the owners of a four-anna share in this mouzah, the remaining three-anna share of which was held by two persons who had opened out a separate account with the Collector with regard to their share. The arrear, for which the property was advertised and put up for sale, amounted to twelve annas eight-and-a-quarter pie. It further appeared that, at the time this arrear fell due, the property was under attachment on account of road-cess and other taxes.

On the 4th June (two days prior to the sale), defendant No. 6 applied to the Collector for permission to pay the amount in

* Appeal from Original Decree, No. 308 of 1886, against the decree of Baboo Sham Chunder Dhur, Subordinate Judge of Sarun, dated the 21st August 1886.

(1) I. L. R., 3 Calc., 300.

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arrear, and an order was passed on such application, allowing him to pay all Government demands, including this arrear of twelve annas eight-and-a-quarter pie. Defendant No. 6, however, failed to pay in such arrears, and on the 6th June the property was sold and purchased at a low price by him in the names of defendants Nos. 1 and 2; and subsequently certain other of the defendants were made co-sharers in such purchase. The plaintiffs sought to set aside the sale, alleging the fraud above-mentioned, and, at the hearing, produced evidence showing that certain intending bidders had been dissuaded from bidding at the sale by certain of the defendants, and although fraud was alleged in the plaint there was no specific prayer for equitable relief.

The defendants denied these facts and alleged that this arrear was in reality due by the plaintiffs.

The Subordinate Judge, although doubting whether a sale under Act XI of 1859 could be set aside on the ground of fraud, found that the fraud above-mentioned had been established, and held, on the authority of the case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdár* (1), that the plaintiffs were equitably entitled to relief, and directed the purchasers to re-convey to the plaintiffs their nine-anna share of the mouzah, on re-payment of a proportionate amount of the purchase-money to the purchasers, with interest at the rate of 4 per cent. from the day of sale.

Defendants Nos. 1, 2, 3, and 4 appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Moulvie *Mahomed Yusuf* for the appellants.

Baboo *Mohesh Chunder Chowdhry*.—There being no specific prayer for equitable relief the lower Court should not have granted it; the prayer of the plaint was for recovery of possession after setting aside the sale; no issue was settled as to whether the plaintiffs were entitled to this relief; on the facts alleged and found no fraud has been made out entitling the plaintiffs to relief, and the finding on the question of fraud is not substantiated by the evidence The case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (1) is distinguishable from the present.

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Mr. *Gregory*, Baboo *Mahabir Sahai* and Baboo *Amarendra Nath Chatterjee*, for the respondents, contended that the action of the defendant No. 6 was fraudulent.

The judgment of the Court (PETHERAM, C. J., and BANERJEE, J.,) was delivered by

BANERJEE, J.—This appeal arises out of a suit by the plaintiffs, respondents, to recover possession with mesne profits of a nine-anna share of a certain property, Mehal Chuck Shah Mohamedpore, after setting aside a sale, held on the 6th of June 1883, of a larger share of the mehal, that is, a thirteen-anna share, made up of the nine-anna share in suit, and of another four-anna share belonging to the defendants Nos. 3 to 23, for arrears of Government revenue due in respect of the said thirteen-annas.

The grounds upon which the plaintiffs seek to have that sale set aside are—*first*, irregularity in the sale; and, *secondly*, fraud on the part of the defendants. The irregularities set out in the plaint need not be considered here, as the judgment of the lower Court, as to the existence and effect of those irregularities, was given against the plaintiffs, and no cross-objections have been urged before us against that judgment. We would only add that, upon the face of the judgment, there does not seem to be any ground for holding that the sale was bad by reason of any irregularity.

The fraud alleged in the plaint is said to have consisted in this, that the property was sold for a very small amount of arrear, less than one rupee; that the plaintiffs were not aware of the existence of the arrear; that the defendants, the plaintiffs' co-sharers, intentionally left this small amount unpaid, with the object of purchasing this property; and that they purchased the property themselves for a price which is less than its proper value. One of the plaintiffs was examined as a witness in the case. He was asked to state in what the fraud consisted, and he stated that it consisted in the facts alleged in the plaint of which the substance has been given above.

It appears that, in the evidence adduced on behalf of the plaintiffs, an additional element of fraud was introduced, namely

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that the plaintiffs' co-sharers, when bidding at the auction, dissuaded intending purchasers from buying. I should add here that the plaintiffs further alleged in their plaint that their co-sharers bought the property *benami* in the name of the defendant No. 1.

The defence was that there was no fraud; that the arrear that was due was due really from the plaintiffs; that the purchase by the defendant No. 1 was not a *benami* purchase; and that the property did not sell for anything less than its fair price.

The Court below, as I have already said, decided against the plaintiffs upon the question of irregularity, but it gave the plaintiffs a decree to the effect that the defendant Durga Sing and his co-sharers in the purchase do reconvey to the plaintiffs the nine-annas share of the property upon receiving from them a proportionate amount of the purchase money with interest at the rate of 4 per cent. from the date of payment thereof; and it gave the plaintiffs that decree upon the ground that the defendants, the purchasers, were guilty of fraud in causing the sale of the property in the manner alleged in the plaint, and in dissuading intending purchasers from buying.

Four of the defendants have appealed against that decree—the defendants Nos. 1 to 4—and the main grounds urged on their behalf are—*first*, that the Court below was wrong in giving the plaintiffs the decree for equitable relief that it has given when the plaintiffs did not ask for any such relief but only sought to recover possession after setting aside the sale, and when the issues raised in the case did not embody the questions necessary to be decided before the plaintiffs could be held entitled to that relief; *secondly*, that upon the facts alleged in the plaint, or found by the Court below, no fraud was made out such as should entitle the plaintiffs to relief; and, *thirdly*, that upon the evidence the Court below was wrong in finding certain facts in the plaintiffs' favour which were said to constitute the alleged fraud.

With reference to the first contention, we do not think the appellants are entitled to succeed upon it. It might be possible that, by reason of the frame of the suit and of the issues,

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raised in the Court below, the appellants were precluded from raising various points in their defence and adducing evidence to substantiate those points. But, as all the necessary parties are before the Court, and the plaint contains a statement of all the necessary facts, we do not think that such a bare possibility of prejudice would entitle the appellants to succeed in this appeal, unless it was shown, or suggested, how they might have been actually prejudiced. As nothing has been shown, or suggested, to make this out, we think this ground must fail.

But we think the appellants are entitled to succeed upon the second and third grounds. We shall consider those grounds separately. The facts alleged in the plaint together with the additional fact noticed above, which was developed in the evidence, come, shortly stated, to this—that the defendants, who were co-sharers with the plaintiffs in the property in arrear, intentionally withheld payment of a certain portion of the Government revenue due in respect thereof, and bought the property themselves, after having dissuaded others from bidding. And the question is,—Do these facts constitute any fraud, considered singly, or collectively? The Court below has answered this question in the affirmative, and given the plaintiffs a decree, relying upon the case of *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozoomdar* (1). But that case is clearly distinguishable from the present. There the defendant undertook to apply to the Collector on behalf of all the co-sharers to save the mehal from the impending sale, and having sent his co-sharers away, with the assurance that he would do everything to protect their interests, neglected to make any application, and bought the estate himself. That was a clear case of fraud. Here it is not even suggested that the defendants in any way prevented the plaintiffs from becoming aware of the existence of the arrear, or from paying it off, as they could if they chose. Every co-sharer in a zemindari may, if he chooses, bring it to sale by not paying the revenue; but every other co-sharer can save it from sale by paying the arrear, and can recover the amount from the defaulter. The fact of the defendants being co-sharers in the property, did not clothe them with any fiduciary character, which disqualified

(1) I. L. R., 3 Calc., 300.

them from buying this property, unless it was for the benefit of all the co-sharers. The Revenue Sale Law, Act XI of 1859, contains sufficient indication to show that a defaulting co-partner is at liberty to buy the estate in arrear.—See s. 53 of the Act.

The authority of decided cases is also in support of this view. We may refer to the case of *Ram Lall Mookerjee* v. *Jodunath Chatterjee* (1), which is a somewhat similar case, as bearing upon this question. The principle applicable to the case of one of several joint tenants obtaining renewal of a lease is inapplicable to the case of a co-sharer in a zemindari buying it at a revenue sale for this simple reason. All the joint tenants having an interest in the old lease, which forms the basis of the right to obtain a renewal, the benefit of a renewal obtained by any one of them is held to belong to them all—See *Clegg* v. *Fishwick* (2). But the right of a co-sharer to buy an estate at a revenue sale is not based upon any right or interest that is common to him and his co-sharers.

If the fact then of the defendants having been co-sharers with the plaintiffs did not clothe them with any fiduciary character, and if the fact of their having committed default in the way and for the purpose alleged in the plaint did not, in the absence of misrepresentation or concealment on their part, constitute any fraud, let us see whether the additional fact of their having deterred others from bidding for the property amounted to fraud. Upon this point the only authority that can be cited in favour of the respondents is a passage in Sugden's Vendors and Purchasers, at page 93 of the 13th edition, which is to this effect—"Fraud will, of course, be a sufficient ground for re-opening the biddings. Therefore, if the parties agree not to bid against each other, the Court could re-open the biddings."

Now this passage has been considered in the case of *Carew's Estate* (3), and it has been held that there is no real authority in support of it, and that an agreement between two bidders not to bid against one another would not be a sufficient ground for annulling the sale. And in a later edition of the work

(1) 9 C. L. R., 337. (2) 1 Mac. & G., 298.
(3) 26 Beav., 187.

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the text has been altered and a note added in accordance with the above ruling—(Sugden on Vendors and Purchasers, 14th edition, p. 117).

The same view is taken in the case of *Galton* v. *Emuss* (1), and the law on the point is thus stated in the last edition of Dart's Treatise on the Law of Vendors and Purchasers (p. 121):—"An agreement between two persons not to bid against each other at an auction is legal, and such an agreement has been held to be valid where the sale has been held by order of Court." And in this Court, in a case very similar to the present, it has been held that a combination among certain purchasers not to bid against one another does not constitute any fraud or impropriety such as would have the effect of vitiating the sale—See the case of *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (2).

There is, therefore, really no authority in support of the position that dissuading of bidders was necessarily an act of fraud. Now, if neither the fact of the defendants being co-sharers and buying the estate after making an intentional default in the payment of revenue, nor the fact of their having entered into combination with other bidders, separately, constituted any fraud; we do not see how, taken together, they could be said to constitute fraud. Even upon the facts found, therefore, we are unable to confirm the decision of the Court below. Of course, if the defendants had the conduct of the sale, and had dissuaded intending purchasers to bid, or if there had been misrepresentation made by these defendants as to the nature of the title, or as to the value of the property, and if, in consequence of such misrepresentation, persons had been deterred from bidding, that would have constituted fraud, and would have entitled the plaintiffs to a decree. But no such thing is proved, or even alleged here.

Whilst we think that, even upon the facts found, the appellants are entitled to succeed, at the same time we deem it right to add that we cannot agree with the Court below in the findings of fact arrived at by it, namely, in the first place, that the default was wholly intentional and made by the defendants

(1) 1 Col., 243. (2) 13 C. L. R., 1.

with the object of buying the property themselves; and in the second place, that there was really any deterring of intending bidders. And first as to whether or not the default was intentional from the beginning, this is how the facts stand. The amount of the Government revenue in arrear was, as I have stated above, very small, less than one rupee. The defendant Dip Naraian, on the 4th of June, that is, two days before the sale made an application to the Collector for permission to pay in the amount, alleging that it was through no fault of his that an arrear had fallen due. Thereupon the order passed by the Collector was to this effect—that the arrears of rent, road-cess, postal contribution, and embankment tax be taken,—and the amount due under all these heads came up to a little over Rs. 20 (see Exhibits vi, vii, pp. 38, 39 of the Paper-book). Now it appears from the evidence—and it is admitted by one of the plaintiffs, Ram Gholam Singh, who was examined as a witness in the case—that the different co-sharers had not come to a settlement as to the road-cess, and it was for that reason that the road-cess arrears were not paid. That being so, it is clear to our minds that, originally, there was no intention on the part of the defendants of allowing the mehal to get into arrears, with the object of buying it themselves. What the defendants really wanted was to obtain a settlement of their disputes as regards the payment of this road-cess. It was only when the defendant Dip Narain found from the order of the Collector, that the payment of the arrears of Government revenue alone would not be accepted, and that he had to pay not only those arrears but also the road-cess and the other items, as to which there was a dispute, if he wanted to save the mehal; that he made default in paying the amount, which the Collector ordered him to pay; and so the mehal was put up for sale. It seems that the plaintiffs' default, in paying the road-cess arrears, may well be regarded as having ultimately led to the sale.

Then as to the other fact, namely, that the defendants deterred intending purchasers from bidding. In the first place it is worthy of note, as I have already pointed out at the very outset, that this element of fraud was not alluded to in the plaint, nor even was it mentioned, when one of the plaintiffs was

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examined as a witness. It was developed in the evidence, and, from the nature of that evidence, we are not at all convinced that the fact deposed to by the plaintiffs' witnesses was true. The Court below has believed those witnesses, considering them to be respectable witnesses. We should not have felt justified in dissenting from the conclusion of fact arrived at by the Court below upon the evidence of those witnesses, if we did not find that evidence so extremely vague, as to the facts deposed to, and so very unsatisfactory, as to the circumstances which led to the presence of the witnesses at the time and place where they say they were, that we could not rightly act upon it. All that they say is, that certain of the co-sharers of the plaintiffs prohibited them and other persons from bidding as they were going to buy the property themselves. In the first place, it does not seem to be very likely that persons who went with the *bonâ fide* intention of bidding, and of bidding up to a certain amount, would so soon, and so readily, upon a mere request, be dissuaded from bidding and from making the bargain that they intended to make. We fail to discover, in the evidence, any sufficient motive that could have induced intending bidders to be dissuaded from bidding. And, in the second place, the account that these witnesses give of the reasons for their presence in the Collectorate at the particular point of time does not seem to us to be at all satisfactory.

Upon the whole, therefore, as well upon the question of law as upon the questions of fact considered above, we feel constrained to dissent from the judgment of the Court below; and we may add here that the evidence adduced to show that the plaintiffs have suffered injury by reason of their property having sold for a price below its proper value, is, in our opinion, neither satisfactory nor precise. Upon all these grounds, therefore, we think that the decree of the Court below must be set aside, and the plaintiffs' suit dismissed with costs in both Courts.

Appeal allowed.

T. A. P.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

DEBI SINGH AND OTHERS (DEFENDANTS) *v.* SHEO LALL SINGH AND OTHERS (PLAINTIFFS).* 1889 *Jan.* 21*st.*

Partition—Jurisdiction of Civil Court—Partition by Civil Court of a portion of a revenue-paying estate—Civil Procedure Code (Act XIV of 1882), *s.* 265—*Revenue-paying estate, partition of, into several revenue-paying estates.*

The meaning of s. 265 of the Code of Civil Procedure is that where a revenue-paying estate has to be partitioned into several revenue-paying estates, such partition must be carried out by the Collector.

Zahrun v. *Gowri Sunkar* (1) approved.

THIS was a suit brought in the Court of the Subordinate Judge of Gya, for the partition of a certain village which formed a portion of a revenue-paying estate. The plaintiffs, Sheo Lall Singh and Punit Singh, held 5 annas and 6 pie in proprietary right, and 4 annas as mokuraridars under the defendants.

The defendants, Nos. 1 to 7, were proprietors of the remaining 6 annas 6 pie share in this mouzah. The plaintiffs asked in their plaint that a single plot of 9 annas 6 pie might be allotted to them.

The defendants contended that the suit would not lie, and that the partition ought to be made by the Collector; that the plaintiffs as mokuraridars were not entitled to a partition of their mokurari share as against them; and also took exception to the mode of allotment of the properties asked for by the plaintiffs.

The Subordinate Judge held that the suit was maintainable by a Civil Court; that the plaintiffs were entitled to a partition of the lands held by them as mokuraridars; and he therefore decided that the plaintiffs were entitled to partition of their 5 annas 6 pie milkiat share, and of the 4 annas held by them as mokuraridars and directed the same to be made by the Civil Court Amin.

The defendants appealed to the High Court on the ground that the decree should be given effect to by the Collector and not by the Civil Court Amin.

* Appeal from Original Decree No. 254 of 1887, against the decree of Baboo Kali Prosunno Mukerjee, Subordinate Judge of Gya, dated the 24th of August 1887.

(1) I. L. R., 15 Calc., 198.

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Mr. *C. D. Linton*, for the appellants, submitted that the decisions of this Court, as well as of the Courts of the other Presidencies, show that Civil Courts have jurisdiction to determine a party's right to have his share divided, and to make a decree accordingly, but the power to make a partition of lands paying revenue to Government was restricted to the Collector. In other words, s. 265 of the Code of Civil Procedure, coupled with s. 29 of the Partition Act (Bengal Act VIII of 1876), placed the execution of the decree entirely in the hands of the Collector, and in support of his contention referred to s. 396 of the Code of Civil Procedure, which provided for the partition of immoveable property not paying revenue to Government, and cited the following cases:—

Chunder Nath Nundi v. *Hur Narain Deb* (1); *Damoodur Misser* v. *Senabutty Misrain* (2); *Badri Roy* v. *Bhugwat Narain Dobey* (3); *Zahrun* v. *Gowri Sunkar* (4); *Ramanuja* v. *Virappa* (5); *Parbhudas Lakhmidas* v. *Shankarbhai* (6); and *Dev Gopal Savant* v. *Vasudev Vithal Savant* (7).

Mr. *R. E. Twidale*, Baboo *Golap Chund Sircar* and Baboo *Nil Kant Sahai*, for the respondents.

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.,) was delivered by

PETHERAM, C.J.—This is an appeal from a decision of the Subordinate Judge of Gya, in a suit brought by the plaintiffs against the defendants to partition the plots of land, contained in a revenue-paying estate among the persons entitled to the estate, but there is no claim in the plaint to have the estate or the revenue payable to Government partitioned, in the sense that it should be turned into several revenue-paying estates.

The Subordinate Judge has decreed the suit, and has directed that the Civil Court Amin shall give effect to it, and the only ground of appeal here is, not that the decree is wrong, but that the decree must be given effect to, not by the Civil Court Amin,

(1) I. L. R., 7 Calc., 153.
(2) I. L. R., 8 Calc., 537.
(3) I. L. R., 8 Calc., 649.
(4) I. L. R., 15 Calc., 198.
(5) I. L. R., 6 Mad., 90.
(6) I. L. R., 11 Bom., 662.
(7) I. L. R., 12 Bom., 371.

but by the Collector of the district, and various cases have been cited before us in support of that view. It is said that, by s. 265 of the Code of Civil Procedure, whenever the estate, in respect of which partition has taken place, is a revenue-paying estate, that partition must be carried out by the Collector. But it seems to us that the meaning of that section is, that where a revenue-paying estate has to be partitioned into several revenue-paying estates, that partition must be carried out by the Collector, because the revenue is affected, and it is for the Collector to say how much revenue shall be assessed upon each portion of the estate, so that there may be a proper security for that revenue, and we think that that is the view which was intended to be taken by Mr. Justice Prinsep and Mr. Justice Pigot in the case of *Zahrun* v. *Gowri Sunkar* (1).

In that case, the learned Judges say—"S. 265 of the Code of Civil Procedure of 1882, which is generally a re-enactment of s. 225 of the Act of 1859, evidently contemplates the existence of the jurisdiction of the Civil Courts to try suits for partition of estates, or for the separate possession of the share of an undivided estate paying revenue to Government, but at the same time it leaves it to the Collector only to give due effect to any order passed by a decree of a Civil Court." And then they go on to say,—"The effect of s. 29 of the Butwarrah Act, as we understand it, is, that the rights of the parties as between themselves in respect to any portion of the estate may be determined by the Civil Court, but that any decree of the Civil Court will not affect the joint liability of the sharers in respect to the payment of the entire revenue assessed on the estate until the Collector has taken proceedings in accordance with that Act."

It seems to us that the meaning of the learned Judges in that case was to say, that the Civil Courts might deal with the matter and might give effect to their decisions, so long as they did not attempt to affect the joint liabilities of the sharers in respect of the whole estate as it stood before. That decision we think does not differ from the various decisions which have

(1) I. L. R., 15 Calc., 198.

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been cited before us, in which it seems to us that the learned Judges, when speaking of the partition of revenue-paying estates were speaking of the partition of such estates into several revenue-paying estates. That is a totally different thing from the partition of the lands within an estate as between the sharers leaving the whole estate liable for the whole revenue, which is the case before us.

For these reasons we think that this case is concluded by the case of *Zahrun* v. *Gowri Sunkar* (1) which I have cited, and with which we entirely agree, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

CRIMINAL REVISION.

1889

January 14.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

GANOURI LAL DAS (AND OTHERS) *v.* THE QUEEN-EMPRESS.*

Rioting—Unlawful Assembly—Right of Private defence of property—Penal Code (Act XLV of 1860), *ss.* 97, 103, 104, 105, 141 *and* 147.

A party of persons, consisting of some five peadas and a number of coolies sufficient for the work to be done, went to a spot on a river flowing through the lands of *M* for the purpose of either repairing or erecting a *bund* across it to cause the water to flow down a channel on to the lands of their master *T*. The river at the time was almost dry, and the party did not go armed ready to fight or use force, and they did not during the subsequent occurrence use force. Having arrived at the spot about 10 A.M. they proceeded to work at the *bund* until the afternoon. At about 4 P.M. a body of men, consisting of about 1,200 in all, many of them armed with *lathies* and headed by the prisoners, who were servants of *M*, which had been seen collecting together during the day, proceeded to the spot, and about 25 or 30 of them attacked *T's* men, some five of whom were more or less severely wounded with the *lathies*.

The occurrence resulted in the conviction of some of *M's* servants for rioting under s. 147 of the Penal Code.

* Criminal Revision No. 405 of 1888, against the order passed by C. A. Wilkins, Esq., Sessions Judge of Bhagulpore, dated the 6th of November 1888, affirming the order passed by Baboo Poorno Chunder Mitter, Deputy Magistrate of Bhagulpore, dated the 24th of September 1888.

(1) I. L. R., 15 Calc., 198.

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M's people wholly denied any right on the part of *T* to construct or repair the *bund*, and had previously denied the existence of such right, and refused permission to *T* to exercise it. It was contended that the assembly of *M's* people was not an "unlawful assembly;" that the interference by *T's* people with the channel of the river justified them in coming to stop the work, and the show and use of force in compelling them to do so.

Held, that the prisoners had been rightly convicted.

Held, further, that as no right of private defence of property is conferred by the Penal Code, except as against the perpetrators of offences under the Penal Code, and that as, upon the facts of the case as found, no offence had been committed by *T's* people, their acts amounting merely to a civil trespass, and that as there was no pressing or immediate necessity of a kind, shewing that there was not time to have recourse to the protection of the public authorities, no question as to the right of private defence arose in the case.

It was further contended that *M's* people did not assemble to enforce a right or supposed right within the terms of s. 141 of the Penal Code, but to defend a right, and that such action did not make the assembly an unlawful one.

Held, that they were members of an assembly the common object of which was, by show of criminal force and by criminal force, if necessary, to enforce the right to keep the river channel clear by preventing the construction of the *bund*, and by demolishing it so far as it was constructed, and that the case came within s. 141, para. (4).

Queen v. *Mitto Sing* (1), *Shunker Singh* v. *Burmah Mahto* (2), and *Birjoo Singh* v. *Khub Lall* (3), referred to and commented on.

IN this case the petitioners were convicted by the Deputy Magistrate of Bhagulpore of rioting under the provisions of s. 147 of the Indian Penal Code, and sentenced to undergo one year's rigorous imprisonment each, and to enter into recognisance bonds in the sum of Rs. 200 each to keep the peace for a period of two years, or in default to undergo two years' simple imprisonment.

Against that conviction and sentence they appealed to the District Judge, who confirmed the conviction and sentence. On the 28th November they applied to the High Court under its revisional powers to send for the record, and to set aside the conviction and sentence on grounds which appear sufficiently in the judgment of the High Court.

(1) 3 W. R., Cr., 41. (2) 23 W. R., Cr., 25.
(3) 19 W. R., Cr., 66.

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On that application a rule was issued calling on the District Magistrate to show cause why the conviction and sentence should not be set aside, and the prisoners were released on bail pending the hearing of the rule.

The rule now came on to be heard.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *Bonnerjee*, Mr. *M. Ghose* and Mr. *M. P. Gasper*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Taruck Nath Palit*, Baboo *Jogesh Chunder Dey*, Baboo *Jogendra Chunder Ghose* and Baboo *Monmotho Nath Mitter* in support of the rule.

Mr. *Phillips* and Baboo *Umakali Mukerjee* for the prosecution.

The facts of the case appear fully stated in the judgment of the High Court and in that of the District Judge, the material portion of which was as follows:—

"The facts are these. Some three years ago, in 1293 F. S., the Thakur's family of Barari in Bhagulpore, purchased a six-annas odd share in village Fazilpore. The lands of this village are irrigated by a water-course, known as the Sanis *Daur*, which issues from the river Karalya. On both banks of this river lie the lands of a native lady, whose husband is known as the "Mohashoyji;" her brother is Baboo Surjya Narain Singh, a leading pleader of this Court; and it is a matter of public notoriety, and has been more than once asserted at the hearing of the appeal without denial, that this pleader is the general adviser of the Mohashoy and of the latter's wife, who rarely acts without his advice.

"The Thakur's family claim to have acquired by their purchase the right to erect or keep in repair a *bund* or embankment across the Karalya river, just at its junction with the Sanis *Daur*, with the object of diverting the waters of the stream into the water-course, and thus to irrigate the lands of Fazilpore. Accordingly, on the 24th June last, their local agents took a body of coolies to the spot to repair or renew this embankment. Whilst they were at work, they noticed that a number of men were being collected together. They appear to have come at once to the conclusion that the Mohashoy's people were about to oppose them in force; and I cannot help thinking that they

knew that they had reason to believe that such a result might ensue. A messenger was at once sent off to Bhagulpore, a distance of some twelve miles. He came first to Barari, and thence went to the thannah where he arrived at 11 P. M., and lodged his information.

"In the meantime, the threatened attack had been delivered; a large body of men, said to amount to some 1,200 in all, advanced to where the work was going on, headed by the appellants. After the usual preliminary discussion, the order was given to attack, and some 25 or 30 of the rioters detached themselves from the main body and fell upon the Thakur's men, five of whom were more or less severely wounded with *lathi* blows; then the rioters dispersed.

"The Sub-Inspector, who had been in the interior when information had been lodged the previous night, was on the spot next day. He commenced his investigation. On the 2nd July a counter-charge was laid by the appellant Ganouri; this also was investigated, and ultimately members of both parties were sent up for trial under charges of rioting. The result is the conviction against which the present appeal is lodged.

"On these allegations, the Deputy Magistrate drew up what he calls three "issues" for determination. The first issue raises the point as to whether the Thakur's men had any right to build a *bund* in the river? The Deputy Magistrate acknowledges that a Criminal Court has no power to determine this issue, and yet, in the same breath as it were, proceeds to answer it, for reasons given, in the affirmative. The question is one purely for a Civil Court to decide; and I may dispose of it in these words, and also by saying that, so far as the record discloses, there does not appear to be any legal evidence to show that it has ever been decided by a competent Court.

"The second issue deals with the question as to whether the Thakurs' men came to repair an existing *bund* or to build a new one? The Deputy Magistrate has decided that they came to build a new one. But, so far as the evidence goes, it seems to me to establish that what they went to do was to erect an embankment on the spot where, as they allege, it stood in previous years; not to build one in an entirely different spot. In fact,

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they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away; for the purposes of this case it is hardly material to enquire which.

"The third issue puts the question as to whether the Mohashoy's men used force, and, if so, whether the five appellants were of their number? No question of the right of private defence of property is raised. It is not even pleaded; but if, on the facts found, it is proved to exist, none the less will it avail the accused. [See *In re Kali Churn Mookerjee* (1).]

"The first point to ascertain is whether the acts charged by the prosecution are made out, that is, whether the appellant party did attack and beat the Thakurs' party whilst the latter were engaged in working on the *bund*? As to this I have no hesitation in returning an affirmative. The evidence has been very lengthy, and a great deal of time has been taken up both in recording, and in commenting upon it in both Courts. It will be sufficient for me to say that, as a whole, I accept the story for the prosecution; there is no evidence to show that any persons, other than the accused and their party, inflicted the wounds which undoubtedly were inflicted on members of the Thakurs' faction; and there is ample, and it seems to me credible, evidence to show that certain members of the Mohashoy's party did inflict those wounds in the manner alleged.

"The next point to determine is which faction acted on the aggressive? A great deal has been made of the evidence of Babu S. N. Singh (W. 18) and of Sujait (W. 25), and it is contended that this evidence proves conclusively that the Thakurs were perfectly well aware of the fact that they could erect no *bund* except with the express permission of the Mohashoy. I do not agree with this contention. In the first place, the evidence of these two gentlemen does not seem to me to be wholly reliable; the first, at least, must be looked upon as personally interested in this case; and the memories of both of them must have misled them as to what actually occurred. Moreover, all that they say as to the alleged request of Babu Hari Mohun Thakur is nothing more nor less than hearsay. Mr. Ghose, indeed,

(1) 11 C. L. R., 232.

urged that it was admissible as having been elicited in cross-examination. I am unaware of any rule or law which renders hearsay more admissible in cross-examination than in examination-in-chief, and in the case of *Bhatori Mushabaini* (H. C., Cal., Cr. App. No. 337 of 1882,) a Divisional Bench held that hearsay evidence should not be recorded, even on the part of the accused. The evidence might perhaps have been admissible to contradict Babu H. M. Thakur had he been examined, but he was not. Moreover, the letter (Ex. S.) of the 20th October 1887 shows *primâ facie* that Babu H. M. Thakur, though he wished for a settlement of the dispute as to whether he could take "earth" from the Mohashoy's zamindari in order to repair his *bund*, distinctly claimed the right of repairing it when he chose. Further, there is a great deal of oral evidence on the record, which I see no reason to disbelieve, to the effect that such repairs had been constantly made by the Fazilpore Zamindars, aided by the proprietors of adjacent villages whose lands are equally irrigated by means of this water-course. I thereupon come to the conclusion that, whatever right may or may not exist, the Thakurs, in proceeding to repair or renew this embankment, were acting in the *bonâ fide* belief that they were entitled to do so. And I do not find that they proceeded to enforce this (supposed) right in the sense of s. 141, Indian Penal Code, for the repairing party were not larger in number than was necessary for the purpose; they evidently did not go to fight, for they at once informed the authorities when a breach of the peace appeared likely; and they did not go armed and ready to use force. They used no force, this is clear, because not one single wounded man has been produced from amongst the Mohashoy's faction, or from amongst any other assemblage of men.

"This being so, the acts of the Mohashoy's faction were clearly illegal. An earthen *bund* in a running stream cannot be made a permanent erection in a few hours; and there was no imminent danger to the property, for there was little or no water in the stream at the time. There was thus ample time to invoke the interference of the authorities, especially as it seems clear that the working party had been observed at an early hour of the day, before the work could have progressed far. The

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Mohashoy's faction, therefore, were deprived of the right of private defence (s. 99, Indian Penal Code), even if the Thakurs' faction had been the aggressors and were trespassers. Moreover, their resistance (or attack) was not made on the spur of the moment; it was deliberate, after measures had been taken to assemble an overwhelming force. In two words, they took the law into their own hands on an occasion when the law deprives them of the right to do so."

The District Judge then proceeded to go into the question of the identity of the accused, and concluded as follows:—

"For the reasons above given, I confirm the conviction and sentence in the case of each accused. I do not think the sentence at all too severe: these open acts of violence, in defiance of the law, are of such frequent occurrence in these districts, that deterrent sentences are absolutely necessary. I have found by experience that sentences of six months' imprisonment and fine have no deterrent effect; and I have already had occasion to remark that I shall be prepared to uphold more severe sentences in all well-established cases of rioting with *lathial* weapons, such as this one. The medical evidence establishes the fact that the hurt caused to the Thakurs' people, though not "grievous" in the sense of s. 320, Indian Penal Code, was certainly severe in the case of one or two of them; in fact, they got an unmerciful and painful beating with *lathies*. The appellants will surrender to their bail in order to serve out the unexpired portions of the sentences passed upon them."

The nature of the arguments advanced at the hearing of the rule are sufficiently stated in the judgment of the High Court (PIGOT and MACPHERSON, JJ.,) which was as follows:—

This case comes before us in revision.

Ganouri Lall Dass, Dursan Lall Dass, Koonjal Jetti, Murat Singh and Moonshi Singh were convicted, under s. 147 of the Indian Penal Code, of the offence of rioting, by the Deputy Magistrate of Bhagulpore, and sentenced to undergo one year's rigorous imprisonment each, and were further directed in the words of the sentence "to execute recognisance bonds in the sum of Rs. 200 each for keeping the peace for a period of two years, or in default to undergo two years' simple imprisonment each."

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On appeal to the District Judge the conviction and sentence were confirmed, and on the 28th November this rule was obtained in this Court, calling on the District Magistrate to show cause why the conviction and sentence should not be set aside. The prisoners were released on bail pending the hearing of the rule.

One member of the present Bench not having sat in the Bench which granted the rule, we heard the rule opened at length by Mr. *Woodroffe* for three of the petitioners and also heard Mr. *Evans* for the other two. Cause was then shown by Mr. *Phillips* against the rule, and Mr. *Evans* was heard in reply for all the petitioners.

The case was argued at great length; we do not say at too great length, having regard to the importance of some of the questions raised before us.

The chief question discussed before us was, whether the acts of the persons convicted did, under the circumstances of the case, come within the provisions of the Indian Penal Code relating to the offence of rioting?

The disturbances, out of which this conviction arose, took place on the 24th June, at a spot on the river Karalya, close to where a water-course called the Sanis *Daur* (or otherwise the Raggahai Khurra) issues from that river.

Around this spot, and on both sides of the river, are lands belonging to Mohashoy Taruk Nath Ghose, of whose Cutchery Ganouri Lal is tehsildar and Darsan Lal is patwari; the other three petitioners appear to be peadas of the same Cutchery; the Mohashoy is described in the petition in this case as the "master" of the petitioners.

Some distance (about two miles) from the point where the *Daur* issues from the river are the lands of Fazilpore, 6 annas of which were bought in 1293 F. S. by the Thakurs' family of Barari. These lands are irrigated by the water-course, which appears to be supplied from the river alone.

The disturbance of June 24th took place in consequence of a number of persons having on that day gone, under the direction of servants of the Thakurs, to the place where the water-course issues from the river, and having, just below the point of junction, bunded up the course of the river (which was then dry or almost

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dry) for the purpose of diverting the waters of the stream into the water-course. It has been a matter of dispute in the case whether or not there was there at the time a *bund* partially washed away, which these persons repaired or attempted to repair; or whether what they went to do was to construct a *bund*, there being none actually there at the time; and it was denied on the part of the Mohashoy's people that a *bund* had ever been at this spot. The Deputy Magistrate (whose finding we refer to only because it is referred to by the District Judge) holds that the Thakurs' people went "to construct a new *bund* as the one which stood there before was washed away." The District Judge says "they went to renew a *bund* which had been entirely washed away, or else to repair one which had been partially washed away:" adding, for the purposes of this case, "it is hardly material to enquire which."

The District Judge finds that such repairs had been before the Thakurs' purchase constantly made by the Fazilpore Zemindars, aided by the proprietors of adjacent villages, and that the Thakurs in proceeding to repair or renew the embankment were acting in the *bonâ fide* belief that they were entitled to do so. The Thakurs' people went in considerable numbers, apparently coolies, save five or six peadas. The District Judge finds that they were not more in number than was necessary for the purpose of repairing the *bund*, for which purpose they went; that they did not go to fight; that they did not go armed and ready to use force; and that they did not use force on this occasion.

Upon these findings, it follows that the acts of the Thakurs' party did not constitute an offence under the Indian Penal Code.

The party arrived at the spot at about 10 A. M. (two ghurries of the day), and worked at the *bund* until the afternoon, by which time they had raised it to a considerable height; and also made it of considerable width. While they were engaged on the work, different bodies of men in large numbers were seen gathering in the neighbourhood, and marching towards the spot with drums or tomtoms beating. The Thakurs' men sent a messenger to Bhagulpore Thannah, about 10 or 12 miles off, who, however, did not reach it until 11 P. M.

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At about 4 P. M. the bodies of men, previously seen gathering, came together to the number, as stated, of 1,200 in all, many of them armed with *lathies*, to where the work was going on, headed by the petitioners. Most of the Thakurs' party had either left, or then fled, and very few were left. Twenty-five or thirty men detached themselves from the main body and fell upon the Thakurs' men, five of whom were more or less severely wounded with *lathie* blows, and three left senseless on the ground. The assembly then dispersed. It is contended that these acts do not amount to rioting under the Indian Penal Code in the present case.

The Mohashoy's people wholly denied any right on the part of the Thakurs to construct or repair or to have in existence, in the river bed, any *bund* such as the Thakurs claimed. They had expressly denied the existence of any such right, and refused permission to the Thakurs to exercise it. They had done so, in communications which passed between the two zemindars, in October and November 1887.

The District Judge thought the evidence of these communications inadmissible as hearsay. We think they were admissible; although we do not think that, upon the fair construction of them, they at all negative the existence of that *bonâ-fide* belief on the part of the Thakurs in the right in respect of the *bund*, which the District Judge finds they had.

It is plain that on the part of the petitioners' master, the Mohashoy, the Thakurs' alleged right was strenuously denied; or, to put in different words his contention, his right to have the channel of the river free and unobstructed by any *bund*, was strenuously asserted by him a right in which, it may not be improper to remark, his villagers probably were interested as well as their landlord.

It is contended, under these circumstances, that the assembly of which the petitioners were members was not an unlawful assembly.

It is pointed out, with perfect justice, that they have not, nor has any one of them, been found guilty of inflicting the wounds, or any of the wounds inflicted on members of the Thakurs' party; so that, if they were not members of an unlawful assembly, they must go free.

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It is argued that the interference by the Thakurs' people with the channel of the river justified the assembly in coming to stop them from working there, and the show and the use of force in compelling them to do so. It was not expressly contended that the amount of injury inflicted on the persons wounded was, such as it was, within the right of the assembly to inflict; it was argued that it would not be fair to use the violence employed as evidence of an unlawful purpose in the coming of the assembly.

But the right under the law to use force was asserted in argument.

This contention was founded, partly on the words of the Indian Penal Code and partly on some of the decisions on that enactment.

It could hardly be supported, we venture to think, upon any supposed policy contemplated by the framers of the Code. The intention can hardly be imputed to the eminent persons who framed, or to the Legislature which enacted the Code of legalising, in certain cases, the levying of private war. We apprehend there can be no doubt that, according to English law, the assembly in this case would be an unlawful assembly, or that executing their purpose as they did, there would have been a riot, for which every member of the assembly would be liable.

Dalton's Justice of the Peace, in a passage constantly cited (as, for instance, in Burns, J. P., "Riot"), pp. 445-446, Ch. 137:—"Every man in peaceable manner may assemble a meet company (and may come) to do any lawful thing; or to remove or cast down any common nuisance done to them. Every private man, to whose house or land any nuisance shall be erected, made, or done, may in peaceable manner assemble a meet company with necessary tools, and may remove, pull, or cast down such nuisance, and that before any prejudice received thereby; and for that purpose, if need be, may also enter into the other man's ground. A man erects a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron, and other things necessary to remove the said weir and made a trench in his land, that they did erect the weir, to turn the water, so

as they might the better take up the said weir, and they did remove the same nuisance. This was holden neither any forcible entry, not yet any riot.

"But in the cases aforesaid, if in removing any such nuisance the persons so assembled shall use any threatening words (as to say they will do it in spite of the other; or they will do it though they die for it, or such like words), or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot; and, therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only without disturbance of the peace or threatening speeches. For the manner of doing a lawful thing may make it unlawful."

Russell, 4th Edition, Vol. I, 380:—"But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it though they die for it, or the like), or in any other way behave in apparent disturbance of the peace, it seems to be riot.....If a large body of men assemble themselves together for the purpose of obtaining any particular end, and conduct themselves in a turbulent manner, either accompanied with acts of violence, or with threats and intimidation calculated to excite the terror and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not."

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The latter part of this passage is taken from Chief Justice Tindal's charge to the Stafford Grand Jury in 1842 (1).

We have, of course, to consider whether the Indian Penal Code has by omission or expression made a sort of violence or threat of violence lawful in India, which is criminal in England. The sections of the Code relating to the right of private defence of property were referred to.

Section 97, paragraph 2, is that which recognises in certain cases this right; and ss. 103, 104 and 105 lay down the limitations of it.

The first and leading characteristic of the right is, that it exists as against an act of theft, robbery, mischief, or criminal trespass, or an attempt to commit one of those offences. No such right is conferred, by any words in these sections, save as against the perpetrators of offences under the Penal Code. The Code confers a right of private defence not as against mere trespass, but as against crime. That is the general scope of it. There may perhaps arise cases of difficulty; cases *inter apices juris* must always, from time to time, arise, and when they do, be dealt with. But this is not such a case. Upon the findings of the District Judge, we must take it, that no offence was committed by the Thakurs' people. The matter does not rest there. The District Judge says that no case was made for the petitioners in the first Court of the exercise of the right of private defence. Nor was it. The defence made was, so far as it touched this question at all, one of civil trespass only. Again, it is shown, and was on another aspect of the case pressed upon us by Mr. *Woodroffe*, that long after the disturbance, the *bund* remained as it was when the attack took place. There was no water in the river to be then diverted. There was no pressing immediate necessity of a kind showing that there was not time to have recourse to the protection of the public authorities. Even apart from this, the District Judge finds it clear that the working party had been observed early in the day before the work could have progressed far; but in place of having recourse to the authorities, the Mohashoy's party, acting with deliberation, assembled, after preparation, in

(1) C. & M., 663.

great force, and went to stop the work at the *bund*. We do not think the right of private defence arose in this case.

Then it is argued that the assembly did not assemble to enforce a right or supposed right within the terms of s. 141.

On the morning of the 24th the Mohashoy was, it is said, in the enjoyment and possession of the right claimed, namely, to have the river channel free. When the assembly went there in the afternoon, they went not to enforce a right, but to defend a right. They went to prevent the continuance of acts which altered the *status quo ante*. It was not intended by the Code to make assemblies which are assembled in support of the *status quo* unlawful. An assembly to alter is unlawful; an assembly to defend is not. This, as we understand, is the argument.

This argument possesses some attractive subtlety. But we do not feel able to accept it. It is dangerous to attempt to lay down any general rule, and there may perhaps be cases in which an assembly to defend a right may not be unlawful; at least, we shall not now affirm that there cannot be. But to accept the general proposition enunciated would be a very different matter. There are many rights of which it may be affirmed that when they are interfered with, the defence of them consists in exercising them in despite of the interference, that is or may be, in enforcing them. There are modes of enforcing a right which are not prohibited by s. 141. What it prohibits is the enforcement of a right or supposed right by criminal force or show of criminal force by an assembly of five or more persons. And rights, the defence of which can only be effected by enforcing them, may come within its provisions.

The section refers to "right or supposed right." This would seem to make a division into: (1*st*) rights in actual enjoyment when interfered with; (2*nd*) rights claimed though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, &c., defends the right by restoring the *status quo ante* and with it the actual enjoyment.

If the proposition contended for be true, then, not merely the right to the actual occupation of property in physical possession,

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but a right of way, a right to draw water from a well, a right to enjoy ancient lights, and many others, may, if interrupted, be vindicated by force or show of force. So long as they are uninterrupted, they are in possession so far as such rights can be. To defend them by force against interruption is to enforce them; and this, if done by five or more is, in many if not in most cases, forbidden by the law.

This proposition, in truth, embodies the view which was expressed by Campbell, J., sitting alone, in the case of *Queen* v. *Mitto Sing* (1) in the passage at page 43 beginning with—"I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession." It is not the judgment of a bench of this Court; and with great respect we dissent from this passage and from that which follows it, and decline to be bound by either.

Leaving the discussion of this general proposition which, if established, would be a defence in this case, we must refer to the judgment of Phear, J., in the Pachgachia case [*Shunker Singh* v. *Burmah Mahto* (2)] which was much relied on.

The Court there held that the right of private defence existed. The Pachgachia people were in "the enjoyment of the use of water which they were then having at the very time." The Amba people came to stop the water by force, if necessary. Phear, J., says: "They" (meaning the Pachgachia people) "were not bound under all circumstances to stand quietly by while their opponents wrongfully and by force committed serious mischief." We think we must take this as a finding upon the character of the act committed by the Amba people; and, that being the finding, the right of private defence arose, there not being time to have recourse to the authorities. The act of the Amba people was held to be an attempt to cause such a change in the property (the actual taking of the water then flowing being treated as property) as to affect it injuriously, and so to be an attempt to commit mischief.

Further, it appears on reference to the papers in the case, that the Pachgachia people had gone to keep their channel clear, and had remained on the spot during the night previous to the

(1) 3 W. R., Cr., 41. (2) 23 W. R., Cr., 25.

disturbance: they were actually in possession of the flow of water so far as that was possible; and the Amba people then came to stop it, and on the finding of the lower Court were the aggressors. Some of the language used in the case, no doubt, affords ground for the argument properly pressed upon us, that it decides in general terms that the maintenance of the actual subsisting enjoyment of a right is not the enforcement of a right within the meaning of s. 141. If the case could only be read as supporting that proposition, we should think it our duty to refer it to a Full Bench. We think, however, that it does not go so far as to decide that.

We understand the case of *Birjoo Sing* v. *Khub Lall* (1) also relied on to include a finding to a similar effect. Couch, C.J., says: "He (the petitioner) went there to do what persons had a right to do, *viz.* endeavour to prevent mischief being done to property which belonged to them; and I think that he cannot, under the circumstances that have been stated, be considered to have been a member of an unlawful assembly so as to be answerable for any acts of violence which were committed by the assembly or any member of it in prosecution of the common object."

In this case therefore, also, the defence of what was held to be property, against what was held to be mischief, constituted the justification accepted by the Courts.

In the present case, if the right claimed by the Thakurs does exist, their people were lawfully engaged upon the *bund* and the *bund* was lawfully there. The petitioners were members of an assembly, the common object of which was by show of criminal force, and by criminal force, if necessary, to enforce the right to keep the river channel clear, by preventing the construction of the bund and by demolishing it so far as it was constructed: though the demolition was not carried out after the effects of the violence used became apparent—a not unusual circumstance in this country. We think the case comes under s. 141, para. 4.

We see no reason for holding that any omission in the charge occasioned a failure of justice in the course of the three months' trial which took place.

(1) 19 W. R., Cr., 66.

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As to the *alibi* set up on behalf of prisoners 2 and 3, we see no reason to doubt that the District Judge fully considered the evidence bearing upon that question; and, so far as we may allow ourselves to express an opinion on the question of fact before him, we should say that we entirely agree with him. The letters are not satisfactory, and even if these accused were present at the well where the bodies are said to have been searched for on the day in question, that would not be inconsistent with their having been, as they are sworn to have been, at the riot afterwards.

We must discharge the rule to set aside the conviction.

But we think we are at liberty to diminish the severity of the sentence imposed. There was a serious question of right raised between the parties. The Thakurs' people stayed quiet after the refusal of permission in October-November until just before the rains were nigh; they were the persons to come on the ground with good reason to know they might be opposed. This does not furnish a justification for the accused; but it does, we think, entitle us to refrain from treating the case as one fit for the exemplary sentence imposed. We quite feel the importance of the District Judge's observations. But, under the circumstance, we think a sentence of six months' imprisonment will meet the ends of justice. We are happy that a line of argument in reply, which we feared might have rendered it impossible for us to reduce the sentence, was not pursued.

Subject to this reduction, we let the sentence stand as it is.

Rule discharged.

H. T. H.

PRIVY COUNCIL.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* LUCHMESWAR SINGH (PLAINTIFF).

P. C.* 1888 *Nov.* 1 & 2.

[On Appeal from the High Court at Calcutta.]

Landlord and Tenant—Long continuance of a tenancy at a low and unvaried rent—Zemindar's right against tenant—Origin and special purpose of the tenancy—Cessation to use the land for such purpose—Burden of proving permanent tenure—Inference of tenancy-at-will, or from year to year.

The evidence having shown the origin and particular purpose of a tenancy, long continued at a low and unvaried rent, *viz.*, from 1798 until 1873, when the tenant ceased to use the land for the purpose; *held*, that it was not to be inferred from that evidence that an agreement had been made between the parties that the tenant should hold a permanent tenure; and *held*, that, on such cessation, the tenant could only resist a suit to eject him by proving, or giving grounds for the inference of, an agreement with the owner of the land that he should have something more of a lease than the ordinary tenancy-at-will, or from year to year; also, that the facts here presented did not lead to that inference.

APPEAL from a decree (20th August 1886) affirming a decree (14th July 1885) of the District Judge of Tirhoot.

The question raised by this appeal was whether or not the appellant, as representing the Government of India, had in former years obtained the perpetual tenancy of village lands, within the Zemindari of the Darbhanga Raj, at a fixed rent. The object of the plaintiff's suit was to establish his right to proprietary possession, as on the termination of a tenancy, of village Malinuggur which had been occupied at a rent, and without any written lease, by the Government of India, for the purposes of its stud at Pusa, from the year 1798, when the stud was established, to its closing in 1873. The defendant asserted a right to continue to hold the village at the same fixed rent, *viz.*, Rs. 972 per annum, which had never varied.

The issues raised questions as to the nature of the plaintiff's right, and of the defendant's possession; also whether the latter had been adverse to the former, and, if so, since when; and, generally, whether the plaintiff was entitled to obtain possession from the defendant.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

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The village Malinuggur from time immemorial formed part of the Zemindari of Darbhanga. About the year 1764, before the East India Company obtained the Diwani, a jaghir for life of this village, and of others with it, was granted by the power then ruling to a Maharaja Rajbullubh, and, in February 1784, a sanad in affirmance of that grant was given to the jaghirdar by the Company. In 1798 the Company's servants arranged with him that the lands of Malinuggur, with another village, Iktiarpore, should be leased by him to the Government for the purposes of the stud then about to be established at Pusa. But, in July of the same year, before any potta was executed, the jaghirdar died; and the jaghir lands came into the possession of the Government authorities on the lapse of the jaghir.

The Zemindar of Darbhanga, Raja Madho Singh, predecessor of the respondent, whose rights as well as those of other Zemindars, to settlement of all the lands in their zemindaris, had been recognized in Regulation I of 1793, and whose lands had been made subject to the decennial settlement, arranged with the Government Officers that the lands of both the above villages should be made over to the Superintendent of the Stud at a rent.

On the 7th April 1800, the permanent settlement of the Tirhoot estates of the Darbhanga Raj was made, and an amaldastak recognizing the Raja's proprietary right in, among other estates, the resumed jaghir, was given to him. Annexed to the Raja's application for, and agreement to settlement, was a list containing the entry of Malinuggur among the villages in the Zemindari of Darbhanga at the rent then paid, *viz.*, Sicca Rs. 911. And on this paper it was that the insertion of the words, "Mokarrari Astabal Company," was made at some subsequent time.

From 1798, in respect of Malinuggur the Government made an annual payment of Rs. 972, which was not varied.

In 1860, by reason of the respondent's minority, his estates were placed under the charge of the Court of Wards, and so continued till their release in September 1879. In December 1872, the Government decided to close the stud establishment at Pusa, and the inquiries directed as to what lands connected with it were in the disposition of the Government led to the assertion by the latter of a right to hold Malinuggur as on a mokarrari tenure.

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The District Judge found that, from the year 1800, the possession of the defendant had not been adverse to the plaintiff's right, and that limitation was no bar to the suit, and he referred to *Perhlad Sein* v. *Doorga Pershad* (1) as an authority to show that the plaintiff had a *primâ facie* title to the village as zemindar of the zemindari within which it was situate. He cited the observation of the Judicial Committee in that case to the following effect: "The appellant is the Zemindar. As such he has a *primâ facie* title to the gross collections from all the mouzahs within his zemindari. It lay upon the respondents to defeat this right by proving the grant of an intermediate tenure." His decree declared that the defendant had no right to permanently hold Malinuggur at a fixed annual rent, and awarded possession to the plaintiff.

On an appeal to the High Court, a Division Bench (WILSON and PORTER, J.J.) gave the following judgment:—

"Under the Regulations, Government was bound to settle these villages with the proprietor, if willing to accept the terms of the settlement; and there is no evidence adduced on the part of Government to show that, at the time this village was settled with the Maharaja of Darbhanga in 1800, any arrangement was made that Government should hold the village in perpetuity at a fixed rate of rent. It is admitted that the village did remain in the possession of Government for the purposes of the stud; but the terms on which the property was held are not apparent on the record, for we are not inclined to differ from the learned District Judge when he holds that the words 'Mokarrari Astabal Company,' in the petition for settlement of the 7th April 1800, are a subsequent insertion. Government has not produced any receipts for rent during the 73 years (1800 to 1873) the stud was in existence, although at paragraph 13 of the written statement put in on behalf of Government, it is asserted 'that from the date of the permanent settlement in 1800, the fixed annual rent of Sicca Rs. 911-10-6 has been paid to the Darbhanga Raj without variation or change.' The first evidence we can find of the payment of rent is in certain proceedings of 1876, when the Darbhanga estates were under the

(1) 12 Moore's I. A., 286 (331); 2 B. L. R., P. C., 111 (128).

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management of the Court of Wards. The Accountant of the Collector's Office, on being called upon for an explanation with regard to the *dastur* money payable to the Darbhanga Raja, writes, under date 8th February 1877: 'Besides the *dastur* money, Rs. 972-8 was paid on account of rent of the Government stud in Mouzah Malinuggur, Pergunnah Kusma, along with the *dastur* money, and has been so written.'

"In the following years, this money appears to have been incorporated with the *zar-dasturat*. We think that the District Judge in this case is right in holding that the onus of proving the nature of the tenancy rests with the defendant, who sets up a title adverse to the proprietor. It is a significant fact that all the other landed property acquired by the stud was held under *pottas;* but with regard to this property no *pottah* is forthcoming, and doubts have always been expressed by the Government officers whether any proper title has been acquired thereto. It must be borne in mind that this village was acquired as an outlying farm for the purpose of pasturage and for growing oats. There can be little doubt, as pointed out by the learned Counsel for the respondent, that if the Stud Officers had found the land unsuitable for the purposes required, or if the village had been swept away by the river, Government might have given back the property to the Raja, who could not possibly have established, as against Government, any agreement to hold the village in perpetuity at a fixed rate of rent. As regards the contention that Government has expended a large sum of money in the improvement of this village, there is no evidence of this on the record. It is true that a bund was constructed to protect the village from inundation, and some trees were planted; but there is nothing to show whether that was done by Government or the tenants on the land.

"The fact that the Government has held a valuable property for more than eighty years at a very low rate of rent, and was permitted to do so without demur so long as the land was required for the public purpose for which it was originally granted, *viz.*, for the purposes of the stud, does not, now that the stud has been abolished, afford any answer to the claim of the Maharaja as proprietor of the estate to recover back his property.

"In this view of the case, we see no reason to disturb the decree of the Lower Court, and dismiss this appeal with costs."

On this appeal Mr. *W. F. Robinson*, Q. C., and Mr. *J. D. Mayne*, for the appellant, argued that the construction to be put on the whole transaction of 1798 was that the Government took possession of Malinuggur as of a tenure terminable at its pleasure only, and at a fixed annual rent. In the Courts below sufficient weight had not been given to the fact that the Government had been in possession since 1798 at a rent which had never varied, and without any proviso as to the continuance of the stud. The question was as to the inference that ought to be drawn as to the actual understanding, or agreement, that existed between Raja Madho Singh and the authorities. At the time when possession was obtained, the Government was in a position to make terms more favourable to itself than the getting of a mere tenancy-at-will. The Government could have made another grant of the lapsed jaghir. The protection of tenancies at fixed rents came into the legislation of Regulation VIII of 1793 (see s. 49); and it was not the presumable agreement that the lands acquired for the Pusa stud, at that time established without any limit as to its duration, should be occupied for any period short of what the Government might determine. There was nothing in what was done in 1798, or 1800, to show that the Government altered their position, which originally was to take a mokarrari potta from the jaghirdar, into that of tenants-at-will to the zemindar, at a rent liable to enhancement from time to time. There was enough to shift the burden of proof on to the respondent to establish such a change in their plans.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne*, for the respondent, argued that, upon the facts, there was no ground for the inference that the Government obtained a permanent lease at a fixed rent; and there were the findings of two Courts against it. The burden of proof was on the appellant to establish a permanent lease. As the Government might at any time, on discontinuing the stud, have relinquished the tenancy; so neither could the zemindar be held bound by the presumed grant of a permanent interest. The case cited in the judgment of the Court of

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first instance, *Perhlad Sein* v. *Doorga Pershad* (1) was referred to; and it was contended that it was not a tenable theory that, when the jaghir was attached in 1798 as lapsed, the Government so held the lands comprised on it as their own estate, that they could, in effect, confer upon themselves a perpetual lease, binding on the Raja, who was zemindar of Darbhanga, when he accepted the settlement. Unless carried to that extent, no argument could be founded on the lapse of the jaghir.

Mr. *J. D. Mayne* was heard in reply.

Their Lordships' judgment was delivered by

LORD HOBHOUSE:—In this dispute about the village of Malinuggur, it appears that the Government of India have been in possession ever since the month of July 1798. It is not disputed that during the whole of that time, and for long before, the village was part of the *Milkiut*, that is, of the zemindari or proprietary estate of the Darbhanga Raj. The Raja now seeks to recover the property. The Government takes the ground that it has made to the Raja, in some shape or other, either as a matter of account or as a matter of actual payment, one uniform payment for 80 years before this dispute arose, and they claim to be perpetual tenants of the village at a fixed rent. At one time, when they put in their written statement, the Government set up that there was an actual mokarrari lease granted to them, and they did so in perfect good faith, upon the ground that a document in the Collector's office, being the petition of the Raja for permanent settlement, contained a description of Malinuggur as being the mokarrari property of the East India Company. It has however been found by both the Courts below that that description is an interpolation or a mistake of some kind, and that the true version of the petition is that which we have in the record, which, if their Lordships understand it rightly, is a copy of the original petition given out from the Collector's office to the Raja, and found in the duftur of the Raja. Therefore that contention is not now insisted upon; and their Lordships have it that in the petition

(1) 12 Moore's I. A., 286 (331); 2 B. L. R., P. C., 111 (128).

of the Raja for a permanent settlement, which contains a list of a very large number of mouzahs, there are a considerable number, about 16, specified as being held under mokarrari grants, and that the Mouzah Malinuggur is not so specified.

But then the Government say that, whether there is or is not a lease, the true inference from the facts is that there was a binding agreement for a perpetual tenancy by them under the Darbhanga Raj. They insist very strongly that it would be irrational to suppose that for such a number of years the Raja would have gone on accepting a payment which had come to be very far below the value of the land, unless he was bound by an agreement of that kind.

That leads their Lordships to consider under what circumstances possession was first taken by the East India Company, and their payment to the Raj settled on the basis on which it has been made for so many years.

It appears that this village of Malinuggur was part of a jaghir granted to one Rajbullubh, apparently by the Nawab Nazim. It was granted certainly before the year 1764, and that was before the Diwani of Bengal, Behar, and Orissa was taken over from the Nawab Nazim by the East India Company. Therefore the British Government found the jaghirdar in possession. In the year 1784 his position was apparently confirmed by a grant from the British Government. Nothing turns upon the special language of that grant, and it is only valuable as showing what the position of the jaghirdar was at that time. It is clear that at that time the village was known to be part of the *Milkiut* of the Darbhanga Raj. What exactly the relations were between the Raja and the jaghirdar does not appear. But the jaghirdar was in possession, and of course was free of revenue.

In 1798 the Government desired to take the mouzah of Malinuggur for the purposes of a stud of horses which they were setting up, or had set up, in the immediate neighbourhood. Rajbullubh was quite willing that they should take his land, and he sent in an account of the revenues extending over 17 years with a request to know what the Government would propose to pay him, and to see the form of the potta that they proposed. Before anything further was done upon those

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negotiations, the jaghirdar Rajbullubh died. The next step in the transaction was that the jaghir was attached, which was done immediately, in the month of July 1798. Within a week apparently of Rajbullubh's death, the Company attached the jaghir, no doubt for the purpose of securing the revenue. Thus the Company got into possession.

The next step after that is the report of Mr. Graham, the Agent of the Company, which bears date the 27th August, 1798. After taking notice of what had passed with the jaghirdar, and of his death, and that the lands had been attached by the Government, he makes this proposal. He says:—"I now propose, as the lands (being part of the *Milkiut* of Raja "Madho Singh)"—that is Darbhanga—"will continue in the hands of Government until the conclusion of the decennial settlement; that it be recommended to the Governor-General in Council to put the lands appertaining to Mouzahs Malinuggur,"—and another village which we may leave out of consideration—"under charge of Captain William Frazer, the Superintendent of the Stud, at a net rent of Sicca Rs. 1,500 from the commencement of the ensuing Fusli year 1206"—that would be 1798 or 1799—"leaving it to the Collector to pay the Malikana to Raja Madho Singh," and so forth.

It would seem that what Mr. Graham advised was done. The Government were in possession; the decennial settlement was going on; their agent had come to a conclusion in his own mind what was a fair rent to pay for the village of Malinuggur; and he advises that the Superintendent of the Stud shall take possession and shall pay the amount which he had settled as fair. That seems to have been done, because, when we come to the permanent settlement, we find on the face of the Raja's petition, and again on the face of an account in the Collector's office, which shows the sums payable to Raja Madho Singh for the resumed Jaghir mehal of Rajbullubh, that those sums, so far as they are due from Malinuggur, amount to the proportion attributable to Malinuggur of the Rs. 1,500 which Mr. Graham advised to be paid for the two villages. Upon that footing the permanent settlement was made. The Raja was the proprietor. The Company were bound by the Regulation

to make the settlement with the proprietor. They did make that settlement, and, as far as their Lordships can judge, they made it exactly on the same footing on which they had been dealing with the village during the currency of the decennial settlement, that is to say, for the space of some two years before the permanent settlement was effected.

That is the whole of the contemporary evidence. There is no other evidence which bears upon the position of the parties excepting this, that we find that from that time forward up to the year 1872, matters remained in precisely the same position. The Government continued in possession of the village; they continued to use the lands for the purpose of the stud; and they continued to be charged at the same rate as was entered in the petition and in the Collector's account.

In 1872 the Government came to the conclusion that they had better give up the stud, and it was accordingly given up, and the village has been used for ordinary agricultural purposes since that time. At that time the present Maharaja of Darbhanga was an infant, and some three or four years after he attained his majority he demanded possession. The mode in which that demand was made, and the time at which it was made, have been observed on by the Counsel for the Government; but in their Lordships' opinion, nothing whatever turns upon the correspondence which took place in the years 1881 and 1883; but whatever were the rights of the parties in 1872, when the stud was given up, precisely the same rights exist now.

Under these circumstances their Lordships think there is no substantial doubt that the Courts below, who have both decided that the Government cannot establish the inference that they are prepetual tenants, are right. The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things, there would be strength in

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that argument, but as the origin of them is known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the plaintiff to explain the possession; it is the business of the defendants to show that it leads to the inference of a perpetual tenancy. But even if the *onus probandi* did not lie so clearly on the defendants, their Lordships think that the reasonable explanation has been given by the Courts below, and that there probably was some understanding, which might have amounted to an agreement, that the Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud the rights of the landlord would revert, and it was he and not the Government who would have the benefit of the increased value of the land. That hypothesis seems more probable than the alternative one, and it is of course always more satisfactory when we can arrive at a reasonable explanation of the facts instead of merely resting the case upon the failure of one party to make out his case against the other.

The result is that their Lordships think the Courts below were quite right, and that this appeal must be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitor for the appellant: *The Solicitor, India Office*, Mr. *Treasure*.

Solicitors for the respondent: Messrs. *Sanderson & Holland*.

C. B.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

1888 *December 3.*

ABDUL MAJID (PLAINTIFF) *v.* JEW NARAIN MAHTO AND OTHERS (DEFENDANTS).*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13.

The decision of an issue in one of two suits tried together, which is not appealed against, cannot be treated as *res judicata* so far as the same issue is concerned in an appeal from the decision in the other suit.

A, a *ticcadar* sued *B* for rent in respect of a holding in the *ticca*. In that suit *B* pleaded that he was a partner of *A* in the *ticca* transaction, and that no rent was due from him in consequence thereof. *B* then sued *A* for an account of the partnership in the same transaction and *A* in that suit denied the partnership. Both suits were heard together by the Munsiff who held *A* was not a partner. *B* appealed against the judgment and decree in the account suit, but did not appeal against that in the rent suit. It was contended on the appeal that the question as to whether *B* was or was not a partner was *res judicata*, by reason of the decision in the rent suit not being appealed against and having become binding.

Held, that s. 13 of the Code of Civil Procedure did not apply, and that the question was not *res judicata*. There was no bar at the time the issue was tried and decided by the Munsiff, and the Appellate Court was bound to decide the appeal upon the evidence.

THE plaintiff instituted this suit against the defendant Jew Narain Mahto and others for an account of a certain *ticca* transaction, alleging that he was a partner with the defendants therein; that the defendants had been managing and collecting the rents on behalf of the partnership and had not rendered him any account or paid him his share of the rent; and that they denied his right thereto. In the suit the defendants denied that the plaintiff was a co-partner, and contended that on this account the suit should be dismissed.

Prior to the institution of the suit Jew Narain and his co-defendants had instituted a suit against the plaintiff for rent, alleging that they were the *ticcadars*; that the plaintiff was a tenant of a portion of the *ticca* property, and was liable to pay rent to them; and that rent was due from him to them.

* Appeal from Appellate Decree, No. 2394 of 1887, against the decree of Baboo Troylokya Nath Mitter, Subordinate Judge of Patna, dated the 29th of July 1887, affirming the decree of Baboo Purno Chunder Ghose, Munsiff of Patna, dated the 24th of March 1887.

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In that suit Abdul Majid pleaded, *inter alia*, that he was a partner of the defendants in the *ticca*.

The issues in the present suit were settled on the 20th September 1886, and in the rent suit on the 14th June 1887, and the question, as to whether the plaintiff was or was not a partner was raised in both suits. The two suits were tried together by the Munsiff, the evidence taken in one suit being treated by the consent of parties as evidence in the other. In the rent suit the Munsiff gave judgment, holding that the plaintiff was not a partner in the *ticca* transaction, and in this suit his judgment was to the effect that for the reasons given in his judgment in the rent suit, he held that the plaintiff was not a partner, and consequently it was unnecessary to try the other issues in the suit. He accordingly dismissed the suit with costs.

Against the Munsiff's decree in the rent suit no appeal was preferred, but the plaintiff appealed against the decree in this suit. When the appeal came on to be heard before the Subordinate Judge, a preliminary objection was raised on behalf of the defendants, that, because the plaintiff had not appealed against the decision in the rent suit, the question as to whether he was a partner or not, was *res judicata*, and that the appeal should, therefore, be forthwith dismissed.

This view was accepted by the Subordinate Judge, and the plaintiff's appeal was dismissed on that ground.

The plaintiff then appealed to the High Court, and on the appeal first coming on to be heard the case was remanded to the Subordinate Judge, in order that he might arrive at a finding upon the evidence as to whether the plaintiff was a partner or not, the question of *res judicata* being reserved for determination after the judgment of the Lower Appellate Court on the facts had been given.

On the remand the Subordinate Judge held that the plaintiff had proved his allegation that he was a partner, and the appeal now came on to be heard before the High Court.

Baboo *Saligram Sing* for the appellant.

Mr. *C. Gregory* and *Munshi Mahomed Yusoof* for the respondents.

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The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

The plaintiff in this case brought a suit against Jew Narain Mahto and others for an account in regard to his share in a certain *ticca* transaction; his allegation being that he was a partner with the defendants in that *ticca*. It appears that these defendants had brought against him a suit for rent alleging that they were the sole *ticcadars*, and that he, the plaintiff in this case, that is Abdul Majid, as a tenant of a portion of the *ticca* property, was liable to pay rent.

In that suit Abdul Majid, the plaintiff in this suit, amongst other things, pleaded that no suit for rent would lie against him as he was a partner in the *ticca*. It is thus clear that the issue whether the plaintiff in this suit, Abdul Majid, was a partner in the *ticca* with the defendants or not, was common in these two suits. Evidence was taken in these two suits bearing upon this issue, and it seems that by consent of the parties the evidence taken in one suit upon this issue was considered as evidence in the other. The Court of first instance decided this issue against the appellant before us, that is to say, it came to the conclusion that he was not a partner in the *ticca* with the defendants. Against the decree for rent, which was passed against the appellant, he did not prefer any appeal, but against the decree which was made in the suit for an account, that is to say against the order of the Munsiff dismissing Abdul Majid's suit, there was an appeal preferred. On the appeal the first question that had to be decided by the Appellate Court was whether the appellant Abdul Majid was a partner with the defendants in the *ticca* transaction or not, and it was contended on behalf of the defendants before the Lower Appellate Court that that question was no longer open between the parties, and that it could not be decided in the Appellate Court on the evidence, because the matter was *res judicata*. That contention rested upon the ground that as the same question had been decided between the parties in the rent suit, and as against the decision in the rent suit no appeal was preferred, that decision, so far as this question of partnership is concerned, is final between the parties in the present suit for an account. The Subordinate Judge of Patna,

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Baboo Troylokya Nath Mitter, who heard that appeal, was of opinion that the contention of the respondents was right, and he dismissed the appeal, not on the ground that upon the evidence the plaintiffs' allegation of co-partnership was not made out, but on the ground that the matter as contended for by the pleader for the respondents was *res judicata* between the parties. On second appeal this question was raised, *viz.*, whether the view taken by the Lower Appellate Court was correct or not, and the record was sent back to the Lower Appellate Court to decide this issue, *viz.*, whether the appellant was a partner or not upon the evidence, reserving the question of *res judicata* on that occasion. If the decision of the Appellate Court upon the evidence had been in favour of the defendants the question of law, *viz.*, whether the decision in the rent suit upon the question of partnership was *res judicata* or not, would not have arisen; but on remand the Lower Appellate Court has found upon the evidence on the record, that the allegation of the appellant, that he was a partner in the *ticca* transaction with the defendants, was established. We have, therefore, now to decide the question of *res judicata* in this case.

We are of opinion that the Subordinate Judge, Babu Troylokya Nath Mitter, was not right in dismissing the appeal, and the appellant's suit upon the ground that it was barred by s. 13 of the Civil Procedure Code. Section 13 says that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they claim. Now the suit for an account was not brought on the same cause of action as the suit for rent. What was contended for was that the issue as to partnership could not be decided on the evidence by the Appellate Court because that issue had been decided against the appellant in the Munsiff's Court in the rent suit, and no appeal had been preferred against the decision of the Munsiff in that suit. Now s. 13 says that no Court shall try any issue which has been directly and substantially in issue in a former suit between the same parties. I omit the word "suit," because the question whether the present suit ucold be decided does not arise. Now in this case we know that

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that issue was tried by the Court of first instance. There was no bar at the time under s. 13, because at that time that issue had not been tried and decided, and therefore could be no bar under s. 13 when the trial was held in the Court of first instance. That being so, and the first Court having decided the case on the evidence, we are of opinion that the Appellate Court was bound to decide the appeal also upon the evidence. That Court was not holding a trial of the issue, and therefore s. 13 could not apply. The Subordinate Judge was deciding the suit in appeal, the issue having been already tried in the Court of first instance; and therefore the words of s. 13 do not warrant the decision of the first Appellate Court to the effect that in that Court the matter was not open between the parties. Nor on general principles do we think that the view taken by the Lower Appellate Court can be supported. The Court of first instance tried the two suits together, and upon the evidence taken in both, the evidence taken in the one suit being considered as evidence taken in the other by consent of the parties, and came to a certain conclusion. The appellant before us, who was plaintiff in one of the suits and defendant in the other, did not think it worth his while to appeal in one of these suits, but he did appeal against the conclusion at which the Lower Court had arrived in the other suit, and we do not see any valid reason why the appellant should be deprived of his right to have the opinion of the Appellate Court on a question which had been considered and decided by the Court of first instance. We are, therefore, of opinion that s. 13 was not a bar to the Appellate Court's deciding the point on the evidence, and as that Court has decided in favour of the appellant, that he was a partner in the *ticca* transaction, the case will now go back to the Munsiff to dispose of it and try all the remaining issues arising in the case. The costs of this appeal will be costs in the cause, and will abide the final result.

H. T. H.

Appeal allowed and case remanded.

ORIGINAL CRIMINAL.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson and Mr. Justice Norris.

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February 7.

QUEEN-EMPRESS *v.* BARTON.*

Merchant Shipping Act, 1854 (17 and 18 Vic., c. 104.), s. 267.—Trial of British Seamen for offences committed on British ship on the High Seas—Procedure at such trial—Murder—Admiralty Courts—British Seamen on British ship—Letters Patent, High Court 1865, cl. 26—Case certified by Advocate-General.

A British seaman, who stood charged with the murder of a fellow sailor on board a British ship on the high seas, was tried by a Judge of the High Court, under the Code of Criminal Procedure; the chief evidence against the prisoner being that given in the depositions of the Captain and Second Officer of the ship, taken on commission; this evidence was admitted in evidence and the prisoner was convicted and sentenced.

It was objected, that, under s. 267 of the Merchant Shipping Act of 1854, the prisoner ought to have been tried in every respect, as though the trial had been held at the Central Criminal Court in London, and that the law of evidence to be applied was that prevailing in England. *Held*, on a case certified by the Advocate-General under cl. 26 of the Letters Patent, that the prisoner had been properly tried according to the ordinary practice of the High Court, and that the evidence was admissible against him.

CASE certified by The Advocate-General (Sir Charles Paul) under cl. 26 of the Letters Patent of 1865.

"William Barton was indicted before Mr. Justice Norris at the 6th Criminal Sessions of 1888, for the murder of one William Malone on board the British ship *Desdemona* on the high seas on the 2nd July 1888.

"The indictment, as originally framed, was to the following effect:—

"'That the said William Barton on or about the 2nd July 1888, upon the high seas and within the Admiralty jurisdiction of this Court, on board the British ship *Desdemona*, feloniously, wilfully and of malice aforethought, did kill and murder one William Malone, a seaman of the said ship, against the form of the statute

* Original Criminal Case, No. 2 of the 6th Criminal Sessions of 1888.

in such case made and provided and against the peace of our Lady the Queen, Her Crown and Dignity.'

"An objection was taken at the trial that the indictment ought to be amended by inserting the words 'being then a British seaman on board a British ship, to wit, the *Desdemona*' after the words 'William Barton' in the said indictment. The amendment was acceded to by the Crown, and the indictment altered accordingly.

"The Counsel for the prosecution having opened the case proposed to put in evidence,—

(1.) "The return of a Commission directed to the Chief Presidency Magistrate for the examination of the Captain, Chief and Second Officers of the said ship who were not present in this country.

(2.) "The deposition taken at the Police Court of one Benjamin Moram, sail-maker on board the said ship, who had been permitted by the Crown to leave with the said vessel.

"Such Commission had been directed by Mr. Justice Trevelyan to issue under s. 503 of the Code of Criminal Procedure.

"It was objected by the Counsel for the prisoner that, under s. 267 of the Merchant Shipping Act of 1854, he ought to be tried in every respect as if he was being tried at the Central Criminal Court in London, and more especially that the law of evidence to be applied to this case was that prevailing in England. Under the law prevailing in England, both these pieces of evidence would have been inadmissible against the prisoner.

"The 267th section of the Merchant Shipping Act of 1854 is as follows: 'All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice who, at the time when the offence is committed, is, or, within three months previously, has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged, in the same manner, and by the same Courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England,

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and the cost and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

"The learned Judge admitted the evidence subject to further discussion, and such evidence was read on behalf of the prosecution accordingly.

"The prisoner was found guilty of manslaughter by the jury, and was sentenced by the Court to penal servitude for life; the learned Judge refused to reserve the point, but referred Counsel for the prisoner to myself under the 26th clause of the Letters Patent.

"The Counsel for the prisoner has appeared before me, and represented the above facts, and upon them I am of opinion that the question, whether the prisoner should have been tried under the provisions of s. 267 of the Merchant Shipping Act of 1854 (17 and 18 Vic., c. 104) according to the English law, and whether the evidence so given was admissible against him, is a doubtful one and one that should be further considered by the High Court, and I do certify.

(Sd.) G. C. PAUL,
Advocate-General."

At the hearing

Mr. *Graham* appeared for the prisoner.

The *Standing Counsel* (Mr. *Phillips*) for the Crown.

Mr. *Graham*—Under s. 267 of the Merchant Shipping Act, 1854, the prisoner should have been tried as he would have been tried had the trial been held at the Central Criminal Court in London. That section has never been amended in any way, and is still in force. There has never been a case of a seaman having been tried by a High Court in India for an offence committed on the high seas, and I submit he should have been tried as though the trial were being held at the Old Bailey.

[NORRIS, J.—No objection was taken to any part of the proceedings save the reading of the Commission and the deposition put in by the Crown.]

[WILSON, J.—Jurisdiction is not affected by procedure.]

Then I say that there was jurisdiction, but the prisoner was not

tried according to s. 267 of the Merchant Shipping Act. The words "heard and determined" mean "heard and determined according to the common law of England." *Bacon's Abridgment, Tit. Statute.*

In *Queen* v. *Thompson* (1) the majority of the Court held that in prosecuting a British subject for an offence committed on board a British ship upon the high seas, the procedure must be that of the local Court trying the case; but Phear, J., stated that s. 267 of the Merchant Shipping Act, 1854, did not apply to the case, but agreed that s. 21 of 18 and 19 Vic., c. 91, did apply, and that under that Act the procedure referred to therein meant the procedure of the ordinary original criminal jurisdiction of the Court. But it seems that s. 21 does not apply to "master, seaman or apprentices," as that section uses the words "any person" instead. In the case of *Queen* v. *Thompson* (1) he was not described as a master, seaman or apprentice. The case of *Reg.* v. *Elmstone* (2) follows Phear J.'s decision, and lays down that s. 267 applies only to seamen of British ships.

[NORRIS, J.—Neither of these sections says that when a British seaman is in Calcutta and when the Legislature say, that he shall be tried by nine jurymen, that the Court shall break the law and try him by twelve jurymen as in England.]

Where there are general and particular statutes, the general statute cannot derogate from the particular.—*Hawkins* v. *Gathercole* (3), *Garnett* v. *Bradley* (4). Section 267 has been on the Statute book since 1844, being substantially s. 58 of 7 and 8 Vic., c. 112, the preamble of which states its object, *viz.*, to afford merchant seamen all due encouragement and protection. This is an Act passed for the benefit of a particular class.

[PETHERAM, C.J.—The only question is how to construe the words "in the same manner," in s. 267. Do they not mean in the same manner as if the offence had been committed within the jurisdiction of the Court of Admiralty in England?] Section 267 controls the act of this Court.

[WILSON, J.—Does not 12 and 13 Vic., c. 96, affect the section?] That is a general statute and meets the case of persons who

(1) 1 B. L. R., O. Cr., 1.
(2) 7 Bom., Cr., 89.
(3) 24 L. J., Ch., 332.
(4) L. R., 3 App. Cas., 952.

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are not provided for by any other statute. In *Queen* v. *Anderson* (1) the whole argument was an endeavour to show that s. 267 did not apply to an American seaman on a British ship, and the offence was committed 70 miles up the Garonne. Section 21 of 18 and 19 Vic., c. 91, s. 11 of 30 and 31 Vic., c. 124, must be read together, they were all discussed in *Reg.* v. *Elmstone* (2), and Westropp, J., held that the effect of the Act of 1855 was to provide for British subjects other than seamen committing crimes on British ships, and that the Act of 1867 was to provide for British subjects committing offences on board foreign ships to which they did not belong.

The Standing Counsel (Mr. *Phillips*), for the Crown, was not called upon.

The following opinions were delivered by the Court (PETHERAM, C.J., WILSON, J., and NORRIS, J.):—

PETHERAM, C.J.—The facts are stated in the case certified by the Advocate-General, and it is not necessary to re-state them here.

It was argued before us, that, under the provisions of the Merchant Shipping Act, 1854, s. 267, the prisoner should have been tried in every respect as if he had been tried at the Central Criminal Court in London, and the cases of *Queen* v. *Thompson* (3) and *Reg.* v. *Elmstone* (2) were cited and relied on on behalf of the prisoner. As to those cases, I think it enough to say that the words relied on were *obiter dicta* only, and that in the result the Court held in each case that the prisoners were properly tried according to the procedure of the Court before which the trial took place, so that both cases are authorities against the view which was pressed upon us.

The question, however, depends upon the true construction of the statutory law. The Merchant Shipping Act, 1854, by no means contains the whole of the legislation on the subject, and when the whole of the enactments are considered, I think the matter is free from doubt.

The first statute in point of time which it is necessary to notice is 12 and 13 Vic., c 96, s. 1. That Act provides that if

(1) L. R., 2. Cr. Cas. Res., 161 (2) 7 Bom., Cr., 89.
(3) 1 B. L. R., O. Cr., 1.

any person is charged in any colony with an offence committed on the seas, he shall be dealt with there, as if the offence had been committed within the limits of the local jurisdiction of the Courts of Criminal justice of such colony.

Next in order of time comes the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, s. 267. That section, so far as it is material to the present question, provides that all offences committed afloat against a person, by any seaman employed in any British ship, shall be inquired of, heard, and tried *in the same manner* as if such offences had been committed within the jurisdiction of the Admiralty of England.

The next statute on the subject is the Merchant Shipping Amendment Act, 1855, 18 and 19 Vic., c. 91. Section 21 provides that if any British subject charged with having committed any crime or offence on board any British ship on the high seas is found within the jurisdiction of any Court of Justice within Her Majesty's dominions, which would have had jurisdiction to try the case if the offence had been committed within its jurisdiction, shall have jurisdiction to try the case as if the offence had been committed within its jurisdiction.

The next enactment is 23 and 24 Vic., c. 88. It extends the provisions of 12 and 13 Vic., c. 96, to India.

The last enactment on the subject is contained in the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124. Section 11 of this Act provides that, if any British subject commits any offence on board any British ship or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's dominions, which would have had cognizance of such offence, if committed on board a British ship within the limits of its ordinary jurisdiction, shall have jurisdiction to hear and determine the case.

If the whole of these enactments apply to the case of an offence committed by a British seaman on board a British ship on the high seas, it is clear that the case must be tried by the Court before which the trial takes place according to its own procedure, as both the 12 and 13 Vic., c. 96, and the Merchant Shipping Amendment Act, 1855, expressly provide that the Court to which the jurisdiction to try the case is given, shall have the same jurisdiction as if

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the offence had been committed within the limits of its local jurisdiction. And it has not been argued before us that this would not be the case, but it has been contended that as s. 267 of the Act of 1854 is for the benefit of, or at least has reference to, a particular class, the general legislation contained in the other statutes cannot operate to control the effect of that section. I cannot accede to this argument, because I think that the section is only a part of the legislation intended to give various Courts in Her Majesty's dominions jurisdiction to try offences committed on the high seas, and is not for the benefit of any particular class. I think, however, that even if s. 267 is read alone, it does not bear the construction sought to be placed upon it by Mr. *Graham*. If the section is read without any portion of it, except those which relate to the expression "*in the same manner*," it will read that offences committed by seamen employed in a British ship afloat, out of Her Majesty's dominions, shall be tried *in the same manner* as if the offence had been committed within the jurisdiction of the Admiralty of England. This in my opinion must mean, shall be tried by the same Court which would have tried the case if the offence had been committed within the jurisdiction of the Admiralty of England, but does not in any way affect the practice of the Court to which the jurisdiction is given. For these reasons I think that the prisoner was properly tried according to the ordinary practice of this Court, and that the evidence was properly admitted.

WILSON, J.—I am of the same opinion, and I think that, when the statutes are looked at in their natural connection, there cannot be any doubt about the matter.

The question before us is, whether the prisoner ought to have been tried, not according to the course of procedure followed by our own Court, but by such a course of procedure as would have been followed by the Courts which ordinarily exercise criminal jurisdiction in England in cases within the jurisdiction of the Admiralty.

There are two Acts which deal with the general question as to how criminal offences, committed within the jurisdiction of the Admiralty, are to be tried here and elsewhere. The first is

12 and 13 Vic., c. 96, which, in its first section, provides in substance that criminal offences committed within the jurisdiction of the Admiralty are to be tried in any Colonial Court, in the same manner as if the offence had been committed within the ordinary jurisdiction of such Court. Then there is Act 23 and 24 Vict., c. 88, which extends this provision to India, declaring that India is to be regarded as a colony within the meaning of the earlier Act.

These Acts have been construed both by this Court in *Queen* v. *Thompson* (1) and by the Bombay High Court in *Reg.* v. *Elmstone* (2), and it seems to me that the effect of these cases, so far as procedure is concerned, is to say that offences committed within the jurisdiction of the Admiralty are to be tried by the Indian Courts according to the course of their own procedure.

Having thus ascertained the general rule for the trial of offences committed within the jurisdiction of the Admiralty, we come next to the particular provisions in the several Merchant Shipping Acts which deal with cases which either do not or may not fall within the ancient jurisdiction of the Admiralty.

The first of these is the section of the Merchant Shipping Act, 1854, 17 and 18 Vic., c. 104, upon which reliance has been placed, namely, s. 267. This section deals with cases which might or might not fall within the Admiralty jurisdiction. It deals with offences committed by British seamen either ashore or afloat out of Her Majesty's dominions. The next Act is the Merchant Shipping Act, 1855, 18 and 19 Vic., c. 91, s. 21, which goes a step further and deals with offences committed by any British subject on board a British ship on the high seas or in a foreign port, or by a foreigner on board a British ship on the high seas. And s. 11 of the Merchant Shipping Act, 1867, 30 and 31 Vic., c. 124, goes on to create a further extension because it includes cases not only of offences committed on board British ships but offences committed by British subjects on board foreign ships to which they do not belong. It seems to me that the real intention of these sections is not to interfere with the course of procedure laid down in the General Act, 23

(1) 1 B. L. R., O. Cr., 1. (2) 7 Bom., Cr., 89.

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and 24 Vic., c. 88, but to secure that, in cases analogous to those of offences committed within the jurisdiction of the Admiralty, though not strictly within it, the same rules of procedure shall apply.

NORRIS, J.—I am of the same opinion and substantially for the reasons given by my brother Wilson.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1889 *February* 8.

POREESH NATH MOJUMDAR (DEFENDANT) *v.* RAMJODU MOJUMDAR AND ANOTHER (PLAINTIFFS).°

Redemption, right of—Foreclosure decree—Order absolute—Redemption of mortgage before order absolute—Transfer of Property Act (IV of 1882), *s.* 87.

In a foreclosure action, the mortgagor can redeem at any time until the order absolute is made under s. 87 of the Transfer of Property Act, 1882.

ON the 4th January 1886 Ramjadu Mojumdar and another (mortgagees) obtained an *ex-parte* decree for foreclosure under s. 86 of the Transfer of Property Act, 1882, against Poresh Nath Mojumdar (the mortgagor), six months' time being allowed for the payment of the mortgage debt. The six months provided in the decree expired on the 4th July 1886, and the mortgage debt was not repaid. The mortgagees, without having previously obtained an order under s. 87 of the Transfer of Property Act 1882, making the foreclosure decree absolute, obtained an order for possession of the mortgaged property in December 1886, and got possession accordingly on the 14th January 1887.

In May 1887 the mortgagor Poresh Nath Mojumdar made an application to the Munsiff of Jhenidah to be allowed to redeem the mortgaged property, having paid the amount of the mortgage debt and costs into Court. The Munsiff was of opinion that the order of December 1886, giving possession to the mortgagees, was illegal, according to the provisions of s. 87 of the

° Appeal from Order No. 380 of 1888, against the order of F. E. Pargiter, Esq., Judge of Jessore, dated the 28th of June 1888, reversing an order of Baboo Bunwari Lal Bannerjee, Munsiff of Jhenidah, dated the 5th of May 1888.

Transfer of Property Act; and, as no order making the foreclosure decree absolute had been obtained under that section, the mortgagor was entitled to redeem. Accordingly, on the 5th May, he made an order for redemption. From this order the mortgagees appealed to the District Judge of Jessore, who reversed the order of the Munsiff for the following reasons: "Section 86 expressly states that if payment is not made within the fixed time, the defendant shall be absolutely debarred of all right to redeem the property. Section 87 gives the Court power to enlarge the time, but, in the absence of this extention, there appears to be no liberty allowed the debtor to redeem after time. The wording of the section is noteworthy. It declares that the decree *shall* debar the debtor of all right to redeem after the fixed time, whereas it only says that on the lapse of that time the decree-holder *may* apply for the decree absolute, and again if he does apply the Court *shall* grant it."

Poresh Nath Mojumdar appealed to the High Court.

Mr. *B. Chakravarti* and Baboo *Jadub Chunder Seal* for the appellant.

Baboo *Srinath Das* for the respondents.

Mr. *Chakravarti*—The judgment of the Lower Court is wrong. As to the nature of a mortgage decree, see Seton on Decrees, 4th Ed., pp. 1035, 1089. The form of decree in a mortgage suit under s. 86 of the Transfer of Property Act 1882, has been taken from the common form in use in England—Macpherson on Mortgages, 7th Ed., pp. 692-4. The Courts of Equity in England can re-open a foreclosure even after the final order—Coote on Mortgages, 4th Ed., pp. 1024, 1026, and cases cited there. *Campbell* v. *Holyland* (1) shows that in a foreclosure suit a mortgagor can redeem even after the order for foreclosure absolute. At all events there is no doubt that he can redeem before the order absolute has been made under s. 87 of the Transfer of Property Act 1882. See *Thompson* v. *Grant* (2) and *Senhouse* v. *Earl* (3).

It is always a matter of discretion whether time ought to be extended to allow the mortgagor to redeem under s. 87. The Judge here has ignored s. 87 altogether.

(1) L. R., 7. Ch. D., 166. (2) 4 Mad., 438.
(3) 2 Ves. Sen., 450.

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Baboo *Srinath Das* for the respondents.—Section 86 says that the defendant in a foreclosure suit shall be absolutely debarred of all right to redeem after the lapse of six months from the date fixed by the Court for payment of principal and interest secured by the mortgage. It is not open to the mortgagor after the lapse of this fixed period to come in and offer to redeem. Mere effluxion of time extinguishes his right to do so.

There is no obligation on the mortgagee to make the application for order absolute contemplated by s. 87. The Legislature uses the word "may" in this section, whereas it uses "shall" in s. 86. Effluxion of time makes the decree absolute.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows :—

In this case a decree for foreclosure was made in the ordinary form under s. 86 of the Transfer of Property Act. Subsequently the plaintiff, without taking any proceedings under s. 87, obtained an order for possession of the property and got possession accordingly. There were then some proceedings with reference to setting aside the decree which are not material to the present purpose.

Subsequently the appellant before us, the mortgagor, made an application to be allowed to redeem this property. The application was allowed by the Munsiff on the ground that no order had been obtained under provisions of s. 87 of the Transfer of Property Act, but the District Judge on appeal set aside that order and dismissed the application for redemption.

We think the Judge was wrong in the order that he made, and that the Munsiff was right. The terms of s. 86 have been taken apparently from the terms of the decree which was formerly made in the Court of Chancery in England, and there is no doubt that, under the procedure of that Court, the mortgagor was entitled to redeem, at any rate, up to the final order of foreclosure. There is authority showing that, even when that final order was made, the mortgagor could redeem ; but for the present purpose it is not necessary to consider those cases. Apart, however, from the English cases, it is quite clear that the Legislature in enacting s. 87 intended to give *some* effect to it, but if the respondents' contention were right, this section would be of no effect, and s. 86

plus non-payment of the money would give a right of possession. Section 87 of the Transfer of Property Act provides that if the payment be not made within the time fixed in the decree, "the plaintiff may apply to the Court for an order that the defendant and all persons claiming through or under him, be debarred absolutely of all right to redeem the mortgaged property." That means that without such an order the defendant would not be debarred of all right to redeem the mortgaged property. The fact that the Legislature allowed the plaintiff to apply for such an order, shows that, without that order, the right to redeem would not be taken away. Section 87 goes on to say: "and the Court shall then pass such order, and may, if necessary, deliver possession of the property to the plaintiff." If the property be not redeemed, the Court would have to pass an order absolute. It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi*, and the mortgagor can at any time, until the order absolute is made, redeem his property. It was always the procedure, both in England and here, that, until there was an order that absolutely debarred the mortgagor from his rights, he could redeem. Of course the Court might put him on terms if there had been any delay, but there is no doubt that until there is an order taking away his right, he is entitled at any time to redeem.

As to interest, it seems that the mortgagee obtained possession on the 14th Jannary 1887. The six months provided in the decree expired on the 4th July 1886, and the applicant, appellant, had paid into Court the principal, interest and costs.

We think that the respondent is entitled to interest on the whole amount due on the mortgage for principal and interest at the end of the six months from decree, at six per cent. per annum from 4th July 1886 to 14th January 1887, when he took possession. He is clearly not entitled to any interest after the 14th January 1887.

The appellant does not ask for any account of mesne profits, so there will be no account of mesne profits from that date till now. The applicant will have one month from the date this order reaches the Court of the Munsiff to pay the interest which he

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has not paid. If he does pay he will be entitled to possession of the property, and if he does not pay, it will be open to the other side to proceed in accordance with the law and to apply for an order under s. 87 of the Transfer of Property Act.

The appellant is entitled to his costs in all the Courts.

C. D. P. *Appeal allowed.*

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1888 *December* 4.

AKSHOY KUMAR NUNDI (PLAINTIFF) *v.* CHUNDER MOHUN CHATHATI AND OTHERS (DEFENDANTS).*

Limitation Act (XV of 1877), *Art.* 179, *cl.* 2—"*Appeal presented*"—"*Where there has been an appeal.*"—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 541—*Execution of decree.*

The words "*appeal presented*" in the Limitation Act 1877, mean an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure.

The words "*where there has been an appeal,*" in Art. 179, cl. 2, of Sch. II, of the Limitation Act, 1877, mean where a memorandum of appeal has been presented in Court.

In the execution of a decree against which an appeal has been presented but rejected on the ground that it was after time, limitation begins to run from the date of the final decree or order of the Appellate Court.

APPEAL from the order of the District Judge of Dacca, affirming the order of the 25th February 1888, of the First Munsiff of Munshigunge, refusing an application for the execution of a decree as time-barred.

On 31st December 1884, the plaintiff Akshoy Kumar Nundi obtained a decree against the defendants Chunder Mohun Chathati and others. From this decree the defendants appealed to the Judge. The appeal was presented after time, and on this ground was rejected on the 10th February 1885. The defendants then filed a second appeal in the High Court, which was dismissed with costs on the 16th February 1886.

On 4th January 1888, more than three years from the date of the decree of the Court of first instance, the plaintiff applied for the execution of his decree. The First Munsiff of Munshigunge

* Appeal from Order No. 293 of 1888, against the Order of T. D. Beighton, Esq., Judge of Dacca, dated the 3rd of May 1888, affirming the order of Baboo Jadub Chunder Sen, Munsiff of Munshigunge, dated the 25th of February 1888.

held that the application was barred by three years' limitation under Art. 179, Sch. II of the Limitation Act: that time began to run from the date of the decree of the Court of first instance, the appeal to the District Judge being in fact no appeal since it had been dismissed as out of time; and, accordingly, he dismissed the application on the 25th February 1888.

On appeal the Judge upheld the order of the Munsiff; and the plaintiff appealed to the High Court.

Baboo *Huri Mohun Chuckerbutty* for the appellant.

Baboos *Srinath Das* and *Baikánt Nath Das* for the respondents.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

This appeal arises out of an application for execution of a decree. Previously in a litigation between the two parties, the defendants appealed from the decree of the first Court. That appeal was rejected on the ground that it was presented after time, and defendants then filed a second appeal to this Court which was dismissed with costs. On plaintiff seeking to take out execution of the decree, it was objected that the time ran from the date of the decree of the first Court, and that the application was barred. We do not think that that contention is correct. Section 4 of the Limitation Act says: * * * "Every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence." Section 5 says: "If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted presented or made on the day that the Court re-opens." That shows that what is meant by the words "appeal presented" in the Limitation Act is an appeal presented in the manner prescribed in s. 541 of the Code of Civil Procedure, that is to say, presented by a proper person to the proper Court.

Article 179 of the second schedule of the Limitation Act says: "Where there has been an appeal, limitation begins to run from the date of the final decree or order of the Appellate Court." In

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this appeal it has been contended, on behalf of the respondent, that the words "where there has been an appeal," mean, where there has been an appeal presented and admitted, and in support of that he refers us to a case of *Dianatullah Beg* v. *Wajid Ali Shah* (1). There are no such words in ss. 4 and 5 as "appeal admitted," and there is nothing in those articles of the Limitation Act, or in s. 541 of the Code of Civil Procedure, that would admit of such a construction.

We are, therefore, of opinion that the words, "where there has been an appeal," mean where there has been an appeal in the ordinary sense and in the sense in which it is used in the other portions of the same Act, *viz.*, when a memorandum of appeal has been presented in Court. We think that the lower Courts are wrong in saying that execution is barred. We, accordingly, set aside the orders of the lower Courts with costs.

C. D. P.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

1889 *February* 14

BENODE COOMAREE DOSSEE (DEFENDANT) *v.* SOUDAMINEY DOSSEE (PLAINTIFF).*

Injunction—Mandatory injunction—Damages—Light and air—Ancient lights.

Where a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building complained of by him has been completed, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, although there might be cases where it would be granted.

Mere notice not to continue building so as to obstruct a plaintiff's rights, is not, when not followed by legal proceedings, a sufficiently special circumstance for granting such relief.

Jamnadas Shankarlal v. *Atmaram Harjivan* (2) referred to.

The law regarding relief by mandatory injunction explained.

* Appeal No. 25 of 1888 against the decree of Mr. Justice Trevelyan, dated the 26th July 1888.

(1) I. L. R., 6 All., 438.

(2) I. L. R., 2 Bom., 138.

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THIS was a suit brought by one Soudaminey Dossee, the widow and executrix of one Gopal Lall Mitter (who had died in the month of May 1886), against one Benode Coomaree Dossee for a declaration that she was entitled to the free and uninterrupted enjoyment of light and air through certain windows on the south side of her house, No. 1, Mitter's Lane, and for an order directing the defendant to remove so much of a new house belonging to the defendant as interfered with or obstructed the said right to light and air, or, in the alternative, for Rs. 10,000 as damages.

The plaintiff claimed title through one Ramsoonder Mitter who had died intestate in 1818, possessed of, amongst other properties, a family dwelling-house and premises formerly known as 21, Mooktaram Baboo's Street, but subsequently subdivided into, amongst other premises, the premises known as Nos. 1 and 2, Mitter's Lane. Ram Coondu left six sons, two of whom died intestate leaving widows only, who subsequently died, the property then being held jointly by the four surviving brothers, amongst whom was Gopal Lall Mitter.

Gopal Lall Mitter, in September 1863, brought a suit for partition of the joint family property left by Ramsoonder Mitter, and, on the 8th July 1865, obtained a decree therein directing a partition; the Commissioners of Partition on the 1st February 1868 completed their return, and thereby (amongst other properties) allotted to the said Gopal Lall Mitter, in respect of his share, that portion of the said family dwelling-house, No. 21, Mooktaram Baboo's Lane, which was, prior to the time of suit, separately assessed and numbered 1, Mitter's Lane. The Commissioners also allotted to one Russick Lall Mitter, a nephew of Gopal Lall's, that portion of No. 21, Mooktaram Baboo's Lane, to the south of the wall of No. 1, Mitter's Lane, which was, prior to the time of suit, separately assessed and numbered 2, in Mitter's Lane, and which consisted of a piece of land unoccupied by any buildings, save huts.

On the 2nd March 1869, the members of the joint family executed mutual conveyances of the different allotments made to them. The conveyance to Gopal Lall Mitter granting the allotment made in his favour "with the benefit and advantage of

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ancient and other lights, easements, appendages and appurtenances, etc."

On the 1st July 1884, Russick Lall sold to the defendant Benode Coomaree Dossee the property known as No. 2, Mitter's Lane, and, in November 1884, she commenced to build on this land the foundation of the first storey of a new building, and subsequently continued the same to a second and third storey, the said first and second stories of the defendant's house being higher than the first and second stories of the plaintiff's house.

This new building was built at a distance of 5 feet from the wall of the plaintiff's house, which distance was still further reduced by the projecting cornices of the new building, which left only a clear space of three feet between the two houses; and from the centre of the wall of the new building a balcony, about 14 feet in length, had been built out, the outer side of which was only 20 inches from the upper floor wall of the plaintiff's house. At the time the said building had been commenced Gopal Lall Mitter, who was then in ill-health, had both personally and through his agents warned the defendant's agents that they were building too near to his house, and the defendants promised not to do anything to obstruct the light and air to the plaintiff's house which was one of two stories only.

In the month of May 1886, on which date the plaintiff alleged the second and third stories had not been completed, Gopal Lall Mitter died leaving a widow and an only son, a minor, appointing, by his will, his widow, the plaintiff, as his executrix. The widow took out probate, and, on the 8th July 1887, through her attorney, wrote to the defendant pointing out that the new building materially affected the access of light and air to No. 1, Mitter's Lane, and calling upon the defendant to remove the obstruction within five days. Receiving no reply to this letter, she, on the 19th August 1887, brought the present suit for the purposes above mentioned, alleging that the windows on the south wall of No. 1, Mitter's Lane, were ancient lights which had been enjoyed as of right and uninterruptedly for more than twenty years, and claiming the benefit of such light and air as was previously had and enjoyed by the owners

of the house prior to the partition, and also under and by virtue of the conveyance of the 2nd March 1869 to Gopal Lall Mitter.

The defendant contended that the plaintiff's husband and the plaintiff herself had acquiesced in the erection of the new building, and that knowing their rights they had not objected till after its completion, which they alleged had taken place before the death of Gopal Lall.

Mr. *Pugh*, Mr. *Stokoe*, and Mr. *Allen* for the plaintiff.

Mr. *Gasper* and Mr. *Garth* for the defendant.

TREVELYAN, J.—The plaintiff is the executrix of the will of her deceased husband Gopal Lall Mitter, who died in the month of May 1886.

She claims relief against the defendant on the ground of the defendant having obstructed her light and air by a new house which the defendant has caused to be built to the south of the house No. 1, Mitter's lane, which belonged to the plaintiff's husband and now belongs to his estate. Gopal Lall Mitter acquired this house by a conveyance, dated 2nd of March 1869, and made in pursuance of a partition between Gopal Lall Mitter and his co-sharers. The south wall of the present land was the south wall of the old family dwelling-house which was partitioned. There is no question and it has been proved that the windows in the south wall of the plaintiff's house existed at the time of the partition and for some time before it. The defendant's house has been built upon land which has heretofore been unoccupied by any buildings except huts, and which formed a portion of the property partitioned. There are really four questions in this case :—

Firstly.—To what easements of light and air (if any) over the defendant's premises is the plaintiff entitled ?

Secondly.—Has there been any material and actionable interference with such easements (if any) ?

Thirdly.—To what relief (if any) is the plaintiff entitled ?

Fourthly.—Has the wall built by the defendant at the east end of the passage separating the plaintiff's premises from the defendant's premises encroached on the land of the defendant ?

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The plaintiff puts her right upon the conveyance, to which I have referred, and upon the partition?

By this conveyance the other co-sharers, including defendant's predecessor in title, conveyed to Gopal Lall Mitter the premises No. 1, Mitter's Lane, "with all and singular the benefit and advantages of ancient and other lights easements appendages and appurtenances whatsoever to the messuages lands hereditaments and premises thereby conveyed or any part thereof respectively belonging or in any wise appertaining or reputed deemed taken or known as part parcel or member thereof or any part thereof respectively then or at any time or times theretofore held used occupied possessed or enjoyed."

I think that these words are wide enough to give a right to the light and air which before the time of the partition came into the south windows of the family house, which are the same as the south windows of the plaintiff's house. There is no doubt that light and air came into these windows. It is true they have wooden shutters, but these are capable of being opened and are not fixed. I have no doubt upon the evidence—and there is really no attempt to deny it—that, before the partition, light and air came into the windows on the south side of the house, which is now the plaintiff's, over the land, which is now the defendant's.

There was then on that land no obstruction to the light and air; there were some tiled huts on the land, but until late in the hearing it was not suggested that these huts interfered with the light and air. As far as the upper storey of the plaintiff's house is concerned, it is clear that there can have been no such interference, and as far as the lower storey is concerned, there was not, until the late stage I have mentioned, any suggestion that these huts blocked out light and air.

Apart from the terms of this conveyance, I think that the plaintiff acquired easements of light and air in accordance with the cases which are to be found in my judgment in the case of the *Delhi and London Bank* v. *Hem Lall Dutt* (1). I must find that the plaintiff is entitled to so much of the use and access of light over the defendant's premises as is reason-

(1) I. L. R., 14 Calc., 839.

ably necessary for the comfortable habitation of her premises, and that she is entitled to so much of the use and access of air over the defendant's premises as may be necessary to prevent her premises being rendered unfit for habitation or business.

The next question is, whether there has been any material and actionable interference with the plaintiff's rights?

The plaintiff's house is two storied. The defendant has built a three storied house at a distance of about 5 feet from the plaintiff's building. The first and second stories of the defendant's house are higher than the first and second stories of the plaintiff's house respectively. The defendant is building a verandah on a level with the floor of her second storey along a portion of her building. This and some projecting cornices are said still further to obstruct the light and air.

Several witnesses speak as to the effect of this building.

Dr. Macleod's evidence shows that the ground-floor of the old building has been practically rendered uninhabitable, and I have no reason for distrusting Nobinkishen Mitter, when he says that he was obliged to remove to the upper-floor. I think that, even without this evidence, it would be obvious that a building of the height of the defendant's premises, built at such a short distance, would have the effect described. It seems to me clear that the lower storey of the plaintiff's house does not obtain from over the defendant's land so much light and air as is reasonably necessary for its comfortable habitation; and furthermore, I think that the lower storey has been rendered unfit for habitation and business so far as air is concerned. The defendant tries to make out a case that the plaintiff gets enough light and air from her inner courtyard, but I do not think that this has got anything to do with the case. She is entitled to get her light and air from over the defendant's premises.

The plaintiff has objected to the balcony which has been erected upon the south of the defendant's premises on a suggestion that it is to be used as a privy. This is a mere suggestion, and without entering into any question as to what right (if any) the plaintiff would have to prevent the erection of a privy near her premises, I am not satisfied that the defendant contemplates

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using this balcony as a privy. I find as a fact that there has been a material and actionable interference with the light and air to which the plaintiff is entitled. With regard to this question the defendant sought to give evidence as to the distance between other houses in the same neighbourhood.

This evidence was, I think, clearly irrelevant, and these distances could not be of the slightest use in this case without a consideration of the rights (if any) by prescription, grant or otherwise of the owners of those houses, and it would involve my trying a separate suit with regard to each of those houses.

I now come to the third question, which is, I think, the most difficult question in the case.

The defendant contends that the plaintiff's husband and the plaintiff have acquiesced in the erection of the defendant's building; that although knowing their right, they did not object until it was completed; and that this suit has been fomented and fostered by one Omirto Nath Mitter, in order to embarrass the defendant in a litigation which was pending between him and the defendant. As far as the balcony, which has not been completed, is concerned, there can, of course, be no question of acquiescence.

There is no doubt, I think, that this litigation is in a great measure owing to Omirto Nath Mitter. He has been pulling the strings throughout; several witnesses speak to the part which he has taken, and there is no doubt that he has managed this case from behind the scenes, whether to assist his relatives or solely to advance his own ends is not so clear. I think the only effect which I can give to the fact that the suit has been to some extent promoted by Omirto Nath Mitter, is, that I must examine with the greater care the evidence, and especially that portion of it which bears upon the second question. In short I must be satisfied that there is a real and not mere fanciful injury. As to that, as I have said before, I am fully satisfied. A great deal of evidence has been given on the question of acquiescence. The plaintiff gives evidence to show that before the lowest storey was completed, objection was made by Gopal Lall Mitter personally and by persons sent by him. The defendant seeks to show that before Gopal died, her third storey was completed, and denies that any objection was made

until a very late date after the building was concluded. I think that the onus of proof on any question of acquiescence, as either destroying or limiting the plaintiff's rights, lies upon the defendant. She must satisfy me that the plaintiff, or her husband, have delayed unreasonably to assert their rights, or have expressly or tacitly assented to what has been done by the defendants.

After a careful consideration of the evidence I am bound to say that I am not satisfied that there has been any acquiescence by either the plaintiff or her husband. There is a certain amount of conflict of testimony as to when the defendant's north wall was completed and whether she, or rather her agents, received any warning from the defendant. I think the probability is in favour of the plaintiff's case. I do not think a man would, without complaint or objection of any kind, allow his light and air to be diminished to the extent that has taken place in the present case. If the plaintiff's husband was well enough to send the messages, which it is said he did, it is likely that he would have sent such messages. If he were too ill to send them, then there would be no question of acquiescence. I do not think that, under the circumstances, the plaintiff herself has delayed at all in putting forward her rights.

The defendant has sought to show by books kept by her brother-in-law the date when the northern portion of her house was completed, but those books on the face of them prove nothing. It is only by an explanation, which may or may not be correct, given by a person who is more or less interested, that any meaning can be attached to these books. They have not the weight of business books, and in fact, on this question, there is nothing more than oral testimony of a not very satisfactory description.

It seems to me that the plaintiff has in no way forfeited her right to have the offending buildings removed. She does not claim to interfere with the ground-floor. The buildings above must be pulled down to such an extent as is necessary for her to obtain from over the defendant's land the light and air to which I have found her to be entitled.

With regard to the fourth question, I am not satisfied on the evidence that there has been any encroachment, and must find as a fact that there has been none.

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The defendant must pay the plaintiff's costs.

From this decision the defendant appealed.

The *Advocate-General* (Sir *Charles Paul*), Mr. *Evans* and Mr. *Garth* for the appellant.

Mr. *Woodroffe* and Mr. *Pugh* for the respondent.

The *Advocate-General*.—The decree should have been one for damages (if any), and not one granting a mandatory injunction. Damages cannot be granted in India on the same principle as they are granted in England, as the mode of living in this country is so different from the mode of living at home; the measure of damages hinges on whether any damage has been suffered. In this case there was no complaint for two years; a mandatory injunction at all events should not have been granted; such an injunction is in the discretion of the Court to allow or not to allow. *Yates* v. *Jack* (1) does not apply to this case. The principles on which summary injunctions are granted are to be found in Kerr on Injunctions, p. 16, and Mandatory Injuctions at pp. 43, 48, 49. See also the cases of *Isenberg* v. *East Indian House Estate Company* (2); *The Curriers Company* v. *Corbett* (3); *Durell* v. *Pritchard* (4); *Lady Stanley of Alderley* v. *Earl of Shrewsbury* (5); *Viscountess Gort* v. *Clark* (6); *Senior* v. *Pawson* (7); and Joyce on Injunctions, p. 1034. Even where the injury amounts to waste, a mandatory injunction is a matter of discretion—*Doherty* v. *Allman* (8). A mere notice about carrying the building higher is not a sufficient notice—see Kerr on Injunctions, p. 18. Here there was no real injury in the true sense of this word; there is no right to south breeze—*Delhi and London Bank* v. *Hem Lall Dutt* (9); *City of London Brewery Company* v. *Tennant* (10).

(1) L. R., 1 Ch. D., 295.
(2) 3 De G. J. & S., 263; 33 L. J., N. S., 392.
(3) 2 Dr. & Sm., 355.
(4) L. R., 1 Ch. App., 244.
(5) L. R., 19 Eq., 616.
(6) 18 L J., N. S., 343.
(7) L. R., 3 Eq., 330.
(8) L. R., 3 App. Cas., 709.
(9) I. L. R., 14 Calc., 839.
(10) L. R., 9 Ch., 212 (220).

The shutting out of air must involve some danger to health, this is not so in the present case. As to the question of light, the injunction is only against the 2nd and 3rd floors, so the light to the ground-floor is not in question; the evidence as to the loss of light is of no value as there is nothing to show whether the doors were open or shut at the time of Mr. Clarke's visit. Then is this an actionable wrong for which an action can be brought at all? The Court below has treated this point in a wrong manner; it should have been treated similarly to the case of *Sreemanchunder Dey* v. *Gopaul Chunder Chuckerbutty* (1). If it had not been for Omirto Nath, no suit would have been brought; it is, therefore, a fanciful claim. As to what are actionable wrongs, see Goddard on Easements, 3rd Ed., p. 1138. Loss of privacy gives no cause of action. As to acquiescence, see what Lord Westbury says in *Sreemanchunder Dey* v. *Gopaul Chunder Chuckerbutty* (1). There should be more than cessation of action for acquiescence.

[PETHERAM, C.J.—I think inaction is evidence of acquiescence.]

The case of *Archbold* v. *Scully* (2) limits this. I, therefore, submit there is no case for a mandatory injunction, and no actionable wrong, but if the plaintiff has any right it is one for damages, and there is no finding as to damage.

Mr. *Evans* on the same side—Preventive relief is in the discretion of the Court (see Chapters IX and X of the Specific Relief Act). Here there was no case for a mandatory injunction—*Durell* v. *Pritchard* (3); *Holland* v. *Worley* (4); *Greenwood* v. *Hornsey* (5).

Mr. *Woodroffe* for the respondent—I contend the north wall of my client's house was finished in August 1886; the time from the death of Gopal, until the time that a representative could be found, should be deducted from the computation for the purpose of seeing if there was delay; at all events after probate there was no delay in bringing this suit. I submit that the suit was brought within a year from the completion of the building. I admit that I consented to the defendant building up to my first floor. It

(1) 11 Moore's I. A., 28.
(2) 9 H. L. C., 360.
(3) L. R., 1 Ch. App., 244.
(4) L. R., 26 Ch. D., 578.
(5) L. R., 33 Ch. D., 471.

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was no part of the defendant's case in the Court below that damages should be given and not a mandatory injunction; they argued in the Court below that there was such complete acquiescence that there was no damage. A deprivation of privacy is an actionable wrong. [PETHERAM, C.J.—Is a right of privacy a right to prevent building so as to overlook your neighbour?] Yes. [WILSON, J.—In a town, that would mean that you may not have windows except looking into the street.] No, for the zenana is only on one side.

As to such a right, see *Gokal Prasad* v. *Radho* (1). [PETHERAM, C.J.—We have no doubt as to your having a cause of action; the only question is whether you have a right to a mandatory injunction? You need not trouble yourself about the question of damages, that cannot be decided here, the best way would be for the parties to agree on the question of damages].

On the question as to when a Court of Equity will give relief by way of injunction or by way of damages, see *Aynsley* v. *Glover* (2). A Court will not give damages unless the injury is one which can be adequately compensated by money, and which is not grave and serious; a man is not to be allowed to make himself a judge in his own case as to whether damages or an injunction should be the remedy. There is a great difference between coming to a Court of Equity to enforce an equitable claim, and to a Court of Common Law for a legal right. In India we are not trammelled with the distinction. At home Lord Cairn's Act practically put the Court of Chancery, which before was the only Court to grant injunctions, into the position of the Courts out here, *i.e.*, giving it power to award damages in some cases instead of granting an injunction. Now what is the nature of the injury caused to this property? Until this is discovered, the Court cannot determine whether the plaintiff ought to have the full measure of relief or something else. Regard being had to s. 562 of the Code the case cannot be sent back on the question of damages. [WILSON, J.—The Court can remand the case under s. 566 for the trial of an issue as to damages?] We have shown what was the nature of our damages.

(1) I. L. R., 10 All., 358. (2) L. R., 18 Eq., 544.

The principle on which the Courts act is that an injunction will proceed unless the injury be not of a grave and serious character—*Durell* v. *Pritchard* (1). There must be a substantial interference with a right as is laid down in *Aynsley* v. *Glover* (2). At page 555 Sir G. Jessel shows that the word "substantial" is not used in the sense of "enormous." Quiescence is not acquiescence. The Judge in the Court below found that a protest had been made, there is, therefore, no question of acquiescence. Whether anything in the nature of mere delay, such delay not being acquiescence, constitutes an abandonment of a plaintiff's rights, is discussed in *Jamnadas Shankarlal* v. *Atmaram Harjivan* (3); that case also shows that where the injury is of a continuing nature, damages cannot be given as relief, as it is impossible to assess damages from year to year, and that in such cases an injunction is granted. It must also be shown that if there was delay such delay has acted prejudicially to the other side. See also *Bennison* v. *Cartwright* (4) where there was delay of more than a year in bringing the action. The case of the *Land Mortgage Bank of India* v. *Ahmedbhoy Habibhoy* (5) points out when an injunction and not damages will be granted, and English cases are there cited as authority for the point—*Kino* v. *Rudkin* (6); *Dent* v. *The Auction Mart Company* (7). I gather from the English cases that where property is seriously or materially lessened, in value by a cause permanent in its character, there the Court will grant an injunction and not damages. *Senior* v. *Pawson* (8) was a case in which there were special circumstances, and on that account damages were given.

Baxter v. *Bowen* (9) was another special case and has been explained in *Gaskin* v. *Ball* (10). As to where a mandatory injunction will be granted see *Aynsley* v. *Glover* (2) and *Krehl* v. *Burrell* (11) where a mandatory injunction was granted.

(1) L. R., 1 Ch. App., 250.
(2) L. R., 18 Eq., 544 (552).
(3) I. L. R., 2 Bom., 133.
(4) 33 L. J., Q. B., 137.
(5) I. L. R., 8 Bom., 35 (67).
(6) L. R., 6 Ch. D., 160.
(7) 3 De. G. & J., 275.
(8) L. R., 3 Eq., 330.
(9) 23 W. R. (Eng)., 805.
(10) L. R., 13 Ch. D., 329.
(11) L. R., 7 Ch. D., 551.

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Mr. *Evans*, in reply, referred to the cases of *Gaskin* v. *Ball* (1) as explaining that *Baxter* v. *Bowen* (2) is an exception to the rule and is not the rule, and on acquiescence, to *Sayers* v. *Collyer* (3).

[On the conclusion of the arguments a certain sum, at the suggestion of the Court during the course of the arguments, was agreed upon by Counsel for both parties as satisfying the claim to which the plaintiff was entitled to as damages, no issue on this question having been framed or tried by the Court below; leaving the decision of the Court to deal with the question as to whether a mandatory injunction should or should not be granted under the circumstance of the case.]

The judgment of the Court (PETHERAM, C.J., and WILSON, J.) was delivered by

WILSON, J.—This case, so far as it relates to the granting of a mandatory injunction, is of undoubted importance to suitors in this Court, and it seems to me that the law on the point has been somewhat misapprehended in the Court below. It rather seems to have been assumed that if the cause of action which undoubtedly existed was established, a mandatory injunction, to pull down the defendant's building or so much of it as might be necessary, would follow as a matter of course. The principal authorities on the subject have been cited and their effect I think is plain.

The cases have all fallen under one or other of two classes. The first kind of case is that of a man who has a right to light and air which is obstructed by his neighbour's building, and who brings his suit and applies for an injunction as soon as he can after the commencement of the building, or after it has become apparent that the intended building will interfere with his light and air; a number of cases under that head have been cited. A leading case is that of *Dent* v. *The Auction Mart Company* (4). To the same class belong *Aynsley* v. *Glover* (5); *Smith* v. *Smith* (6); *Krehl* v. *Burrell* (7); *Greenwood* v. *Hornsey* (8). Those cases all

(1) L. R., 13 Ch. D., 329.
(2) 23 W. R. (Eng.), 805.
(3) L. R., 28 Ch. D., 110.
(4) L. R., 2 Eq., 238.
(5) L. R., 18 Eq., 544.
(6) L. R., 20 Eq., 500.
(7) L. R., 7 Ch. D., 551.
(8) L. R., 33 Ch. D., 471.

establish that although the remedy by mandatory injunction is always in the judicial discretion of the Court, and the circumstances of each case may be taken into consideration, still as the general rule, and in the absence of special circumstances, if the injured man comes to Court on the first opportunity after the buildings have been commenced, or on the first opportunity after he has seen that they will interfere with his rights, an injunction being necessary, a mandatory injunction is granted. On the other hand, however, there may be circumstances which will lead the Court to refuse the injunction, as has certainly been done in two cases—*Senior* v. *Pawson* (1) and *Holland* v. *Worley* (2).

The other class of cases comes under a different principle. When a plaintiff has not brought his suit or applied for an injunction at the earliest opportunity, but has waited till the building has been finished, and then asks the Court to have it removed, a mandatory injunction will not generally be granted, though there might be cases where it would be.

This is shown by the case of *Isenberg* v. *The East Indian House Estate Company* (3); *Curriers Company* v. *Corbett* (4); *Durell* v. *Pritchard* (5). The latter case came before the Lords Justices from a decision of the Master of the Rolls, and L. J. Turner lays down that it is within the jurisdiction of the Court to grant a mandatory injunction, but it ordinarily abstains from granting one unless under very special circumstances. The next case I would refer to—*City of London Brewery Company* v. *Tennant* (6)—where the jurisdiction of the ourt to grant a mandatory injunction is reaffirmed, but it is added in the judgment of Lord Selborne: "We know, of course, that the Court is not in the habit of doing so except under special circumstances, but those circumstances may exist." The same law is followed in *Stanley of Alderley* v. *Shrewsbury* (7). There have been cases where mandatory injunctions have been granted. In *Baxter* v. *Bowen* (8) a mandatory injunction was granted by Vice-Chancellor Bacon, and his judgment

(1) L. R., 3 Eq., 330.
(2) L. R., 26 Ch. D., 578.
(3) 3 De. G. J. & S., 263.
(4) 2 Dr. & Sm., 355.
(5) L. R., 1 Ch. App., 244.
(6) L. R., 9 Ch. App., 212.
(7) L. R., 9 Eq., 616.
(8) 23 W. R. (Eng.), 334.

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was affirmed on appeal (1). But in that case the circumstances were peculiar. The thing removed was a mere shed, and there was something like an agreement between the parties that no objection should be taken on the ground of complainants having delayed in bringing their action. That case has been explained as a very special case in *Gaskin* v. *Ball* (2), where it is said : "The Court will rarely interfere to pull down a building which has been erected without complaint. *Baxter* v. *Bowen* (1) was a very special case, just one of those exceptions which prove the rule." Certain circumstances have been relied on in this case as making it a special one, particularly the notice which the plaintiff's witnesses say they gave to the defendants not to continue the building so as to obstruct the plaintiff's rights. The learned Judge in the Court below has believed these witnesses, and I accept his finding ; but the authorities show that mere notice, not followed by legal proceedings, is not sufficient.

That is how matters stand, so the English authorities, and, I think, the Indian authorities are to the same effect. I had occasion to refer to the authorities in the case of the *Shamnugger Jute Factory* v. *Ram Narain Chatterjee* (3). I only refer to that case because on pages 200-201 a good many of the authorities are collected. A Bombay case was cited, which, it was contended, is inconsistent with this view of the law, *Jamnadas Shankarlal* v. *Atmaram Harjivan* (4). There, under the circumstances of the case, a mandatory injunction was granted ; but we cannot, I think, regard that case as laying down any broad rule that mandatory injunctions are to be granted as a matter of course ; but it appears to me the law on this point is well settled.

T. A. P. *Appeal allowed.*

Attorneys for the appellant : Messrs. *Orr and Johnson.*

Attorney for the respondent : Baboo *Aushutosh Dhur.*

(1) 23 W. R. (Eng.), 805.
(2) L. R., 13 Ch. D., 329.
(3) I. L. R., 14 Calc., 189.
(4) I. L. R., 2 Bom., 138.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Wilson. Mr. Justice Pigot, Mr. Justice O'Kinealy and Mr. Justice Macpherson.

DEB NARAIN DUTT (CLAIMANT) *v.* NARENDRA KRISHNA (DECREE-HOLDER) AND ANOTHER (JUDGMENT-DEBTOR).* 1889 *February* 9.

Bengal Tenancy Act (VIII of 1885), *s.* 170—*Decree for rent under Bengal Act VIII of* 1869—*Attachment under decree obtained under Rent Law of* 1869, *subsequently to the passing of Act VIII of* 1885—*General Clauses Consolidation Act (I of* 1868), *s.* 6.

Before the Bengal Tenancy Act of 1885 came into operation, a decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy, in respect of which the rent had become due, was attached in execution of such decree. A claim was subsequently put in to the attached property by a third person, which claim was disallowed as being forbidden by s. 170 of the Bengal Tenancy Act of 1885: *Held*, that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution; the term "proceedings" in s. 6 of Act I of 1868 not including proceedings in execution after decree.

REFERENCE to a Full Bench made by Mr. Justice PIGOT and Mr. Justice RAMPINI; the referring order was as follows:—

This is an application made by Deb Narain Dutt, claimant and petitioner, to set aside an order of the First Munsiff of Baruipur, made on the 18th June 1887.

The order was made in execution proceedings in suit No. 871 of 1886—*Moharaja Narendro Krishna* v. *Russick Chunder Chumputti*. In that suit a decree for arrears of rent was made on the 29th April 1885 under the provisions of Bengal Act VIII of 1869. On 29th December 1886, after the Bengal Tenancy Act of 1885 came into operation, the decree-holder applied for execution, and the tenure in respect of which the decree for arrears of rent had been made, was attached. Notice to stay the sale of the tenure by depositing the decretal amount was served upon the applicant in the present case by the decree-holder: but this circumstance has, in our opinion, no bearing upon the question which arises in the case. The tenure was put up for sale, and the applicant then preferred a claim objecting to the execution proceeding,

* Full Bench on Civil Rule, No. 1118 of 1887, obtained against the order of Baboo D. N. Sarkar, Munsiff of Baruipur, dated 18th June 1887.

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which was numbered as a claim case, No. 22 of 1887, under s. 63 of Bengal Act VIII of 1869.

By the order of the 18th June 1887, which it is now sought to set aside, the Munsiff rejected the claim without enquiring into it, on the ground that, under the provisions of s. 170 of the Bengal Tenancy Act, no such claim could be preferred.

This order was made upon the authority of a decision of this Court of the 27th May 1886, in Rule No. 798 of 1886. That decision is not reported. The terms of it are as follows:—

"Execution of the decree for arrears of rent obtained by the petitioner was taken out on the 6th of January last. The proceedings, therefore, in our opinion, would be regulated by the Bengal Tenancy Act of 1885. The tenure of the debtor was attached and advertised for sale. A claim was made by a third party to have two-thirds of this tenure exempted from sale as having been purchased by him. The Munsiff found that the claimant had purchased one-third, and accordingly exempted that one-third share from sale. An objection has been raised under s. 170 of the Bengal Tenancy Act to the effect that the Munsiff acted without jurisdiction. That section provides that the sections of the Code of Civil Procedure, under which such an order could be passed, shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon. Under such circumstances we set aside the Munsiff's order as without jurisdiction. We make the rule absolute with costs."

We are unable to concur with the above decision. We are of opinion that, under s. 6 of Act I of 1868, the provisions of the Bengal Tenancy Act do not apply to this case.

The decree in the present case was made before the Bengal Tenancy Act came into force. But it appears to us that this circumstance would not affect the question whether the provisions of the Act applied, inasmuch as the suit was instituted before the Act came into operation. In our opinion, "proceedings" in the 6th section of Act I of 1868 include all proceedings from the institution of the suit to the final step taken in execution of decree.

We think it better to submit to the Full Bench a specific question as to the correctness of this reason for the opinion at which we have arrived, because as to this, the cases are not uniform, there being a decision of the High Court of Bombay which treats proceedings in execution as a new set of proceedings.

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The questions we refer to the Full Bench are:—

1. Whether, in the present case, the provisions of the Bengal Tenancy Act were applicable to proceedings in execution?

2. Whether the term "proceedings" in s. 6 of Act I of 1868 does or does not include proceedings in execution after decree?

The cases to which we would refer are the following:—

Ratanchand Shrichand v. *Hanmantrao Shivbakas* (1); *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (2); *Runjit Singh* v. *Meherban Koer* (3); *Mahomed Hossein* v. *Hadji Abdulla* (4); *In re Ratansi Kalianji* (5); *Thakur Prasad* v. *Ahsan Ali* (6); *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (7); *Behary Lall* v. *Goberdhun Lall* (8); *Jugmohun Mahto* v. *Luchmeshur Singh* (9); *Becharam Dutta* v. *Abdul Wahed* (10); *Hurrosundari Dabi* v. *Bhojohari Das Manji* (11); *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (12); *Satghuri* v. *Mujidan* (13).

Baboo *Troilokyanath Mittra* for the claimant.

Under the old law a claimant had a right to have his claim investigated, it cannot have been the intention of the Legislature to deprive him of that right by the new law. The old Act was saved by s. 6 of the General Clauses Act of 1868. Proceedings in execution must be taken to be part of the suit itself, and that being so, under s. 6 of General Clauses Act, these proceedings could not be affected by the new Act. I submit the provisions of the Bengal Tenancy Act do not apply to a decree passed before that Act came into force. An application for execution is an application in the suit—*Mungul Pershad Dichit* v. *Grija Kant Lahiri* (7); and, if so, s. 170 of Bengal Tenancy Act does not apply, the same principle is enunciated in *Runjit Singh* v. *Maherban Koer* (3).

The case of *Ratanchand Shrichand* v. *Hanmantrao Shivbakas* (1) lays down that "any proceedings" includes all proceedings in any

(1) 6 Bom., H. C., A. C., 166.
(2) B. L. R., Sup. Vol., 985; 9 W. R., 402.
(3) I. L. R., 3 Calc., 663.
(4) I. L. R., 3 Calc., 727.
(5) I. L. R., 2 Bom., 148.
(6) I. L. R., 1 All., 668.
(7) I. L. R., 8 Calc., 51.
(8) I. L. R., 9 Calc., 446.
(9) I. L. R., 10 Calc., 748.
(10) I. L. R., 11 Calc., 55.
(11) I. L. R., 13 Calc., 86.
(12) I. L. R., 7 Bom., 459.
(13) I. L. R., 15 Calc., 107.

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suit from its institution to its final" disposal; and I take it execution proceedings fall within the term "final disposal." I rely on *Thakur Prasad* v. *Ahsan Ali* (1); *Mahomed Hossein* v. *Hadji Abdullah* (2); and *In re Ratansi Kalianji* (3); *Hurrosundari Debi* v. *Bhojohari Das Manji* (4); *Satghuri* v. *Mujidan* (5).

[WILSON, J.—The case of *In re Ratansi Kalanji* is not of much use to you in the present case, but you may take it that all the judges who decided it on the construction of the General Clauses Act took the same view that has been taken by this Court.]

Baboo *Rash Behari Ghose* for the opposite parties.

It is suggested by the other side that because the decree was outstanding there is a pending proceeding within the meaning of s. 6 of the General Clauses Act; and also that "proceedings" is identical with "suit." The distinction for which I contend, however, is pointed out in *Jugmohun Mahto* v. *Luchmeshur Singh* (6) where it is said that "although an application for execution is an application in the suit resulting in a decree, it may not be an application in a pending proceeding; the suit having matured into a decree it could not properly be said to be pending thereafter."

If the application had been pending thus, the old procedure could have been used, but not so if no step had been taken in execution. The definition of the word "decree" in the Civil Procedure Code show that there is a distinction between "suit" and "decree." Section 3 of the Code shows a distinction between proceedings before and after decree. Section 25 of the Code does not sanction transfer of "execution proceedings," but of "suits." Under s. 64 it has been held that execution proceedings are not proceedings in a suit.

[WILSON, J.—There is no use in citing one Act for the purpose of construing another.]

The case of *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (7) is especially in point, and upholds my contention as to pending proceedings, and *Shivram Udaram* v. *Kondiba Muktaji* (8) carries

(1) I. L. R., 1 All, 668 (671).
(2) I. L. R., 3 Calc., 727.
(3) I. L. R., 2 Bom., 148.
(4) I. L. R., 13 Calc., 86.
(5) I. L. R., 15 Calc., 107.
(6) I. L. R., 10 Calc., 748.
(7) I. L. R., 7 Bom., 459 (463).
(8) I. L. R., 8 Bom., 340.

this principle still further. See also *Rustomji Burjorji* v. *Kessowji Naik* (1), also *Chinto Joshi* v. *Krishnaji Narayan* (2); in none of these cases has execution been regarded as an integral part of a suit.

The judgment of the Full Bench (PETHERAM, C.J., WILSON, PIGOT, O'KINEALY and MACPHERSON, JJ.) was delivered by

WILSON, J.—Section 170 of the Bengal Tenancy Act VIII of 1885 enacts that "ss. 278 to 283 (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon." This Act became law on the 1st November 1885. Among the sections of the Code thus excluded are those under which claims to property attached in execution are made. Before the Bengal Tenancy Act came into operation, a decree for rent was obtained under the Rent Act then in force (Bengal Act VIII of 1869), which Act embodied the provisions of the Code of Civil Procedure. After the Bengal Tenancy Act became law, the tenancy in respect of which the rent decreed had become due was attached in execution of the decree. The present applicant filed a claim to the property attached, but the Munsiff, in whose Court the proceedings took place, rejected the claim as being forbidden by s. 170 of the Bengal Tenancy Act. The question that we have to consider is, whether s. 170 of that Act applies to the present case, and the answer depends upon s. 6 of the General Clauses Act I of 1868, by which "the repeal of any Statute, Act, or Regulation shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation."

The Courts of this country have frequently had to consider the effect of legislative change in the law upon proceedings instituted before the change was made, and the cases in which they have had to do so, fall, I think, under one or other of three classes.

The first class of cases consists of those in which the Courts have had to construe enactments which have altered the law, not by the mere repeal of earlier enactments, so as to bring the

(1) I. L. R., 8 Bom., 287 (293). (2) I. L. R., 3 Bom., 214.

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case under s. 6 of the General Clauses Act, but by new affirmative provisions, and in which the new enactments contain in themselves no special rule for their own interpretation. In such cases the Courts have applied the settled rule of construction ordinarily acted upon in the absence of any statutory rule inconsistent with it; and that rule is, that retrospective effect is not ordinarily given to an enactment so as to affect substantive rights but that provisions affecting mere procedure are applied to pending proceedings. To this class belong such cases as *Framji Bomanji* v. *Hosmasji Barjorji* (1); *Lal Mohun Mukerjee* v. *Jogendra Chunder Roy* (2); *Uzir Ali* v. *Ramkomal Shaha* (3).

The second class of cases comprises those in which the enactment to be construed provides its own rule of construction by expressly or impliedly declaring that it is or is not to have retrospective operation, or the extent to which it is to affect pending proceedings. To this class belong *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4), in which the Privy Council construed the Limitation Act, 1871; *Tupsee Singh* v. *Ram Sarun Koeri* (5), in which a Full Bench of this Court placed a construction upon s. 21 of the Bengal Tenancy Act; and several cases which will be considered later, in which the Courts have construed s. 3 coupled with other sections of the Civil Procedure Code.

The third class of cases consists of those in which the law is changed by a mere repeal of a previously existing law, and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by s. 6 of the General Clauses Act.

The case now before us belongs to the third class, and, for the purpose of deciding it, we have to construe the words in s. 6, which say that the repeal of a Statute "shall not affect any proceedings commenced" before the repeal takes effect.

The word "proceedings" is a very general one, it is not limited to proceedings connected with civil suits; but includes,

(1) 3 Bom., H. C., O.C., 49.
(2) I. L. R., 14 Calc., 636.
(3) I. L. R., 16 Calc., 383.
(4) I. L. R., 8 Calc., 51.
(5) I. L. R., 15 Calc., 376.

I suppose, proceedings other than civil proceedings, and civil proceedings other than suits. When applied to suits, it may be used to mean the suit as a whole, or it may be used, and often is used, to express the separate steps taken in the course of a suit the aggregate of which makes up the suit.

I propose first to consider the decisions affecting the question before us, and, in doing so, I shall have to notice some which did not depend upon the construction of the General Clauses Act, but which have a more or less close bearing upon the question before us.

In *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1) the question was whether an application for execution was governed, in respect of limitation, by the Limitation Act of 1859, or that of 1871, and the Privy Council held that an application for execution is an application in the suit, and that, therefore, a provision in the later Act excepting from its operation "suits" commenced before a certain date, applied to proceedings in execution in such suits.

The remaining cases which have to be considered may be conveniently divided into three groups. The first consists of cases relating to appeals under various acts, and were all decided simply upon the construction of the General Clauses Act. Of these cases the earliest in date is *Ratanchand Srichand* v. *Hanmantrao Shivbakas* (2) before Couch, C.J., and three other Judges of the Bombay Court. It was held by them that the repeal of an Act, under which an appeal lay against a decree, did not bar the appeal in a case in which the decree was passed before, but the appeal presented after the repealing Act. The ground of the decision is thus stated at page 169: "a suit is a judicial proceeding, and the word 'proceeding' must be taken to include all the proceedings in the suit from the date of its institution to its final disposal, and, therefore, to include proceedings in appeal."

The case of *Thakur Prasad* v. *Ahsan Ali* (3) before the Full Bench of the Allahabad High Court only bears upon the question before us, in that it is an authority for the proposition that,

(1) I. L. R., 8 Calc., 51. (2) 6 Bom., H. C., A C., 166.
(3) I. L. R., All., 668.

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under s. 6 of the General Clauses Act, an appeal is a part of the same proceedings as the thing appealed against.

In *Syed Mahomed Hossein* v. *Hadji Abdullah* (1), a case decided on the Registration Acts, 1871 and 1877, it was held that the repeal of an Act which forbade an appeal did not give an appeal against an order made before the repeal.

Similarly in *Hurrosundari Dabi* v. *Bhojohari Das Manji* (2) it was held that "proceedings" in s. 6 of the General Clauses Act include an appeal against a decree, and that ,therefore, the repeal of a section forbidding an appeal did not give an appeal against a decree in a suit brought before the repealing Act came into operation, and the same thing was held in *Satghuri* v. *Mujidan* (3).

The second group of cases relate to execution, and most of them were decided on the construction of the General Clauses Act.

In the case of *Shumbhochunder Holder* (4), the decision turned upon the construction of s. 12 of the High Court's Act, 24 and 25 Vict., Cap. 104. That section runs: "From and after the abolition of the Courts abolished as aforesaid in any of the said Presidencies, the High Court of the same Presidency shall have jurisdiction over all proceedings pending in such abolished Courts at the time of the abolition thereof, and such proceedings, and all previous proceedings in the said last mentioned Courts, shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued as nearly as circumstances permit under and according to the practice of the abolished Courts respectively." This provision so far as it keeps alive the practice of the abolished Courts in pending cases, is exactly analogous in character to the enactment that we have to construe, and the expression "pending proceedings" cannot, I think, be distinguished in meaning from "proceedings commenced."

The matter came before the Court, consisting of Peacock, C.J., and Morgan and Phear, JJ., in this way: Three persons had been arrested in execution under writs issued from the

(1) I. L. R., 3 Calc., 727.
(2) I. L. R., 13 Calc., 86.
(3) I. L. R., 15 Calc., 107.
(4) Bourke, O.C., 59.

High Court similar in form to the writs of *Ca. Sa.* in use in the Supreme Court, and they were brought up by *habeas corpus* and claimed to be discharged on the ground that their detention was illegal. It turned out according to the view that ultimately prevailed that the legality or illegality of the custody of each man depended upon whether the procedure in force in the Supreme Court or that of the High Court was to be followed. It is only necessary to notice the case of one of the prisoners—Shumbhoochunder Holder. With regard to him, all the Judges agreed, though not without some doubt on the part of Phear, J., that his case was governed by the old law, on the ground that the decree against him had been obtained and execution proceedings instituted against him in the Supreme Court before its abolition, and that the proceedings then before the Court were under the circumstances a continuation of those earlier execution proceedings. A series of cases have arisen upon the Limitation Act, 1877. In *Behary Lall* v. *Goberdhun Lall* (1), Mitter and Norris, JJ., dealing with the effect of that Act upon the execution of decrees passed before it came into operation, held that, by reason of s. 6 of the General Clauses Act, the provisions of the previous law remained unaffected. In *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (2) the plaintiff obtained a decree before the Limitation Act of 1877 was passed. After the passing of that Act, he made an application, which, under the former law, would have had the effect of keeping the decree in force for the purpose of execution, but which, under the latter Act, had not that effect. It was held that a subsequent application for execution was barred. West, J., in delivering judgment, said: "In the case quoted—*Behary Lall* v. *Goberdhun Lall*—'proceedings' are identified with suit; but we think that where a decree has been obtained, the application for execution initiates a new set of proceedings—see *Andrews* v. *Marris* (3)—and that, therefore, the rule of the General Clauses Act (I of 1868) is not to be held to govern all the remotest ministerial consequences of a suit arising on applications made years afterwards according to the

(1) I. L. R., 9 Calc., 446. (2) I. L. R., 7 Bom., 459.
(3) 1, Q. B., 3.

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procedure in force at its institution, but only to bring under the same law such series of proceedings as group themselves naturally together, as *e.g.*, those on a particular application for execution." The same question again came before Mitter and Norris, JJ., in *Jugmohun Mahto* v. *Luchmeshur Singh* (1), and the learned Judges differed from their previous opinion. Mitter, J., said: "As to 'proceedings' being identical with 'suit,' it seems to me that we held that proposition to be correct on the authority of the Privy Council decision in *Mungul Pershad Dichit's* case; and after hearing arguments in this case, and after considering the judgment quoted, I still adhere to that opinion, *viz.*, that an application for execution of a decree is an application in the suit which resulted in the decree. That was distinctly held in *Mungul Pershad Dichit's* case, and we are bound by that decision. But at the same time it seems to me that, although it is an application in that suit, it may not be an application in a pending proceeding. The suit having matured into a decree could not properly be said to be pending thereafter. A proceeding to be a pending proceeding after a decree must be initiated by an application for execution. But after a suit terminates in a decree, if nothing further is done, it cannot be said to be a pending proceeding. It is on that ground that I think we were not right in the decision in *Behary Lall* v. *Goberdhun Lall* (2)." A similar view was taken by Prinsep and Macpherson, JJ., in *Becharam Dutta* v. *Abdul Wahed* (3).

In a case cited in the order of reference, it was held that s. 170 of the Bengal Tenancy Act applies so as to exclude a claim in an execution after the Act came into operation, though I presume the decree was before that date.

In *Shivram Udram* v. *Kondiba Muktaji* (4), West and Haridas, JJ., held, if the case is to be regarded as a decision on the General Clauses Act, that where property has been attached in execution, an application by the attaching creditor for sale of the property is a new proceeding. Perhaps, however, this case ought rather to be regarded as having been decided on the other grounds pointed out in the judgment.

(1) I. L. R., 10 Calc., 748.
(2) I. L. R., 9 Calc., 446.
(3) I. L. R., 11 Calc., 55.
(4) I. L. R., 8 Bom., 340.

The third group consists of cases decided with respect to the Civil Procedure Code, and almost all of them were expressly decided, not upon the General Clauses Act, but upon that Act together with and modified by the special rules of construction laid down in the Civil Procedure Code. The first of these is *In re Ratansi Kalianji* (1) before Westropp, C.J., and four other Judges. The point decided was that a judgment-debtor imprisioned in execution under the Civil Procedure Code of 1859, and who had been in prison for six months, was not entitled to be released on the passing of the Code of 1877, which reduced the period of imprisonment for debt to six months. The decision turns upon the construction of the Procedure Code itself, which contained rules of construction different from those of the General Clauses Act, and I do not find that any of the learned Judges expressed an opinion as to what the effect of the General Clauses Act upon the case would have been if the special rules of the Procedure Code had not been present to control it, except Green, J., who cites *Ratanchand Shrichand* v. *Hanmantrao Shivbakas* (2) and is disposed to regard proceedings as applying to suits "including execution and appeal."

In *Chinto Joshi* v. *Krisnaji Narayan* (3) an application made after the repeal of the Procedure Code of 1859 to set aside a sale made in execution proceedings commenced under that Act was held to be governed by the repealed Act. The question whether execution is a part of the same proceedings as the suit within the meaning of s. 6 of the General Clauses Act, did not arise; and if I rightly follow the judgment of West, J., he intentionally guarded himself against expressing an opinion upon any question of so general a character; but he suggested a test when he said that the proceeding before the Court was "so intimately connected with the proceedings in execution that it ought properly to be regarded as a part of those proceedings." In suggesting that test, I think it is only reasonable to suppose that the learned Judge had in view, not merely the General Clauses Act, but the General Clauses Act modified by s. 3 and other sections of the Procedure Code, in the manner which had been explained in *In re Ratansi Kalianji* (1).

(1) I. L. R., 2 Bom., 148. (2) 6 Bom., H. C. A. C., 166.

(3) I. L. R., 3 Bom., 214.

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In *Runjit Singh* v. *Meherban Koer* (1) the question for consideration related to cases in which, under the Procedure Code of 1859, an appeal to this Court was allowed, but in which the Act of 1877, if applicable, did not allow them, and in which the suits were instituted before the change in the law, but the appeals were presented after it. The Judges were unanimous in holding that the appeals lay. Garth, C.J., accepted to the full the ruling of the Bombay Court in *Ratanchand Srichand* v. *Hanmantrao Shivbakas* (2) that the word "proceedings" in s. 6 of the General Clauses Act includes the whole of a suit; and expressed the opinion that there was nothing in the Code itself to exclude that view. I think Jackson, J.'s view is the same. The other learned Judges—Markby, Mitter and Ainslie—decided the case on other grounds and guarded against expressing an opinion on this point.

In *Rustomji Burjorji* v. *Virbhadrapa Irsangapa* (3), a case depending, not upon the General Clauses Act, but upon s. 3 and other sections of the Civil Procedure Code, Sargent, C.J., and Haridas, J., accepted the test suggested by West, J., in *Chinto Joshi* v. *Krishnaji Narayan* already cited, for determining the identity of proceedings.

As to the first of the groups of cases just treated of, those relating to appeals, there is, I think, a completely uniform course of decision to the effect that an appeal is a part of the same proceedings within the meaning of s. 6 of the General Clauses Act, as the thing appealed against, and that therefore if the thing appealed against is a decree in a suit, the appeal is a part of the same proceeding as the earlier steps in the suit. These decisions are, I think, too numerous, passed by too many Courts, and spread over too long a time for us to be justified in questioning them. And I do not see how they can be logically supported upon any ground narrower than that assigned in the first case in the series, namely, that "proceedings" in s. 6 of the General Clauses Act, when applied to a suit, means the whole suit; and it would seem to follow that the proceedings, in the sense of the suit, must include execution, which is undoubtedly a step in the suit.

(1) I. L. R., 3 Calc., 663. (2) 6 Bom., H. C., A. C., 166.
(3) I. L. R., 8 Bom., 287.

On the other hand, it is always dangerous in matters like that before us to reason too confidently from general propositions. There can be no doubt that a thing may be a step in the suit, and may yet well be regarded as a proceeding separate from the other steps in the suit. And in enquiring whether execution should be so regarded, we may, I think, be justified in looking outside the General Clauses Act. It is not an Act regulating procedure; that is the object of another class of Acts. In this Act, therefore, we may well understand "proceedings" in the sense of proceedings as defined and regulated by the law for the time being in force governing procedure with regard to any given subject-matter. As to suits under the Bengal Tenancy Act, the Civil Procedure Code generally applies; and the Civil Procedure Code has to some extent divided the whole proceedings in a suit into separate proceedings. There is nothing in itself unreasonable in holding that execution is such a separate proceeding, and there is this distinction between appeals and executions; that an appeal is of necessity a proceeding between the same parties as the matter appealed against; whereas, proceedings arising in execution may be, and in the case before us are, between one of those parties and a stranger to the suit.

The second group of cases, those relating to execution, are all to the effect that execution is to be regarded as a separate proceeding from the previous steps in the suit. With regard to the cases in Bombay and in this Court, upon the Limitation Act as affecting execution proceedings, *Gurupadapa Basapa* v. *Virbhadrapa Irsangapa* (1), and *Jugmohun Mahto* v. *Luchmeshur Singh* (2), I have no doubt (if I may say so with due deference) that upon any view of the present question they were rightly decided on the ground that the General Clauses Act, s. 6, did not apply. If the true view be that the word "proceedings" in that section does not embrace the whole suit so as to include execution, then it is clear that the result was right. If the other view of the meaning of "proceedings" should prevail, I still think that s. 6 would not apply to the cases in question, because I think the operation of the section ought to be limited to the cases in which a change in the law is strictly the result of the

(1) I. L. R. 7 Bom., 489. (2) I. L. R., 10 Calc., 748.

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repeal of an enactment, not of substantive enactment in the new legislation. And I should be disposed to say that the rules of law to which effect was given in the cases of which I am speaking, became such, not by the repeal of the old law, but by the substantive enactments of the new. The fact, however, remains that the first of these grounds and not the second was the one actually taken by the learned Judges who decided the cases: and they are, therefore, authorities for the narrower construction of the word " proceedings," and for holding that an application for execution initiates proceedings separate from those which resulted in the decree. The rule upon which *In re Shumbhoo Chunder Holder* (1 was decided lends strong confirmation to this view.

Of the last group of cases, those decided upon the Civil Procedure Code, all but one were distinctly based upon the terms of the Code itself, not merely upon the General Clauses Act. The one exception is *Runjit Singh* v. *Meherban Koer* (2), in which Garth, C.J., considered that there was nothing in the then Code of Civil Procedure to modify the effect of the General Clauses Act. The word upon which he based that view has been changed in the subsequent Acts. But the opinion of Garth, C.J., remains that the word " proceedings " applies to a suit in its entirety. There is the opinion of Green, J., in *In re Ratansi Kalianji* (3) to the same effect. On the other hand, there is the view stated by West, J., in the cases cited with some support from Sargent, C.J., in *Rustomji Burjorji* v. *Kessowji Naik* (4).

Upon a consideration of the authorities, the result, in my opinion, is that whether the two currents of decision, that relating to appeals and that relating to execution, can or cannot be explained upon grounds logically satisfactory, we must accept them; and I should, therefore, answer the question referred to us,—the first in the affirmative, the second in the negative. The rule will be discharged with costs.

T. A. P. *Rule discharged.*

(1) Bourke O.C., 59.
(2) I. L. R., 3 Calc., 663.
(3) I. L R., 2 Bom., 148.
(4) I. L. R., 8 Bom., 287.

CRIMINAL REFERENCE.

Before Mr. Justice Milter and Mr. Justice Trevelyan.

JAGAT KISHORE ACHARJYA CHOWDHURI (1ST PARTY) *v.* KHAJAH ASHANULLAH KHAN BAHADUR (2ND PARTY).*

1889 *February* 13.

Criminal Procedure Code (Act X of 1882), *s.* 145—*Possession, Inquiry into —Time at which Magistrate has to determine who was in possession—Undisturbed possession immediately before dispute.*

In an enquiry under s. 145 of the Criminal Procedure Code, where the property in dispute was forest land, the right to possession of which was exercised by cutting and removing timber from time to time, the Magistrate found that the men of the first party had been driven away by those of the second, and had been unable to enter the forest and remove the timber alleged to have been cut by them; that this happened before the time of the initial proceedings and continued to the date of the hearing; and that the men of the second party had been able to bring out of the forest the timber which had been cut. Upon these findings he came to the conclusion that the possession of the second party had been established, and made an order under the section in their favour.

Held, that having regard to the nature of the property in dispute, these facts could not constitute legal possession of the second party at the time the proceedings were instituted.

Held, further, that in like cases, having regard to the nature of the property in dispute, and the mode in which possession may be exercised over it, in order to find which party was in possession when the proceedings were instituted, it is necessary to inquire which party was in undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately proceeding the one on which the dispute arose; and whichever party be found to have been in possession on that occasion should be presumed to have possession at the time when the proceedings were commenced.

THIS was a reference made by the Sessions Judge of Mymensingh for the purpose of having an order made by the Joint Magistrate of that District, under s. 145 of the Criminal Procedure Code, set aside, the Sessions Judge being of opinion that the order was not justified upon the findings of fact by the Magistrate. The circumstances which gave rise to the proceedings being

* Criminal Reference No. 17 of 1889, made by H. P. Peterson, Esq., Sessions Judge of Mymensingh, dated the 11th of January 1889, against the order passed by C. W. E. Pittar, Esq., Officiating Joint Magistrate of Mymensingh, dated the 24th of September 1888.

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taken under that section and the order being passed were as follows:—

The subject-matter of the dispute was a tract of forest land claimed by the first party as a part of Rangamatia-gur, and by the second party as a part of Atia-gur.

In the month of March 1888, a number of trees had been cut in the forest by labourers, having authority to do so from one or other of the parties, and a dispute arose between the parties with reference to the right to remove the timber and a police enquiry was held. On the 3rd April, the head constable submitted a report stating that the dispute was regarding a plot of land extending over two-and-a-half miles and that there was a likelihood of a breach of the peace, as both parties were endeavouring to remove the timber.

On that, proceedings were taken under s. 107 of the Criminal Procedure Code, which resulted in an order being passed on the 7th June, binding down Tarini Prosad Chuckerbuty, who was a lessee of the second party, to keep the peace.

That enquiry and the police report formed the basis of these proceedings, which were instituted on the 9th June. Both parties appeared, and numerous witnesses were examined on behalf of both sides.

On the 24th September 1888, the Joint Magistrate passed the order complained of. The material portion of his judgment was as follows:—

"The subject-matter of dispute between the two parties to these proceedings is a tract of forest land claimed by the first party as the Rangamatia-gur, and by the second party as part of the Atia-gur. The Eastern and Western boundaries are in dispute. . . . . In March last a number of trees were cut in this forest by labourers having authority from one or other of the parties. A dispute arose in consequence of these acts and a police enquiry was held. A report was submitted by the Head Constable on the 3rd April. On that, proceedings under s. 107, Civil Procedure Code, were taken and decided on the 7th June. That enquiry and the report of the police officer formed the basis of these proceedings, which were initiated on the 9th June. It is necessary to decide which party was in possession on that date.

Possession of property of this nature is exercised whether by the landlord or by his lessee by allowing the public to cut the timber, who are assessed proportionately to the amount of timber which they cut. As a rule no written authority is given to individuals to cut timber, in which case the arrangements described are made by the person who acquires such a right. In this case, however, it is asserted that that licences were given on the last and previous occasions of cutting timber. Each party has given evidence of possession having been exercised on previous occasions, and evidence of title has been given as corroboration and explanatory of the evidence of possession. In deciding the fact of actual possession, I dismiss from my mind all considerations of the legal title of either party. In *Ambler* v. *Pushong* (1) it has been laid down that the Magistrate has to find which of the parties is in possession of the subject-matter of the dispute at the time when he is enquiring into the matter, which, in the contemplation of the law, is identical with the time of the institution of the proceedings, and not at any time previous thereto, and he has no concern as to how the party then in actual possession obtained possession, but has only to pass an order retaining him in possession. It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died. Neither party can bring that timber away now, as the cut timber in the forest is under attachment; but it does not appear that the first party brought away a single tree. It is, therefore, perfectly clear that the second party has retained the possession which it had at the commencement of these proceedings. This being so, it is unnecessary to go into any of the circumstances previous to the institution of this case, and it also becomes unnecessary to deal

(1) I. L. R., 11 Calc., 365.

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with the objection raised by the second party as prejudicial to them."

The Joint Magistrate then went into the question as to whether the lessees should have been made parties to the proceeding, and, deciding that question in the negative, declared the second party to be entitled to retain possession until evicted therefrom in due course of law. The first party thereupon petitioned the Sessions Judge, who referred the case to the High Court. In his order of reference, the Judge stated his reasons for disagreeing with the Magistrate's order as follows :—

"In submitting the case for the inspection of the Court, I beg to report that, in my opinion, the order was not justified on the limited finding of the Lower Court. The finding on the question of possession, refers to a period commencing with the entry by the men of the second party and forcible exclusion of the first party from the disputed forest. There is no finding regarding any earlier period, and as the Officiating Joint Magistrate, on the commencement of the quarrel, bound down, under s. 107, Criminal Procedure Code, a lessee of the second party, yet on the authority of *Ambler* v. *Pushong* (1), he has restricted his enquiry on the point of possession to the interval between the receipt of the police report regarding a probable breach of the peace, and the proceeding drawn up in June under s. 145, Criminal Procedure Code, on disposal of the inquiry under s. 107, Criminal Procedure Code. It will be further noticed that there is no decision regarding the persons who cut the wood; and this being the initial proceeding in the dispute, the enquiry appears to me defective and judgment thereon incomplete.

An additional enquiry, under the circumstances disclosed of one party cutting the timber, and the second removing it, as to possession *before* the actual cutting of the trees and opposition against entry or re-entry as the case may be, and order thereon, would appear to me more conformable to the law on this section of the Criminal Procedure Code as set forth in rulings subsequent to that relied on by the Joint Magistrate."

The case now came on for hearing before the High Court.

(1) I. L. R., 11 Calc., 365.

Mr. *Woodroffe*, Mr. *Gasper*, Baboo *Grish Chunder Chowdhry* and Baboo *Pramatha Nath Sen* for the first party.

Mr. *Garth* and Baboo *Basanta Kumar Ghose* for the second party.

The judgment of the High Court (MITTER and TREVELYAN, JJ.) was as follows:—

The Magistrate in this case, following the decision in *Ambler* v. *Pushong* (1), has maintained the second party in possession of a piece of forest land. It appears not to be disputed that the right of possession upon the forest lands in question is exercised by cutting timber from time to time, and removing that timber, upon a certain price being paid therefor. It further appears that in Falgun last year (or March 1888), a number of trees was cut in the forest by labourers who had authority to do so either from the first party or the second party. It also appears that there was a disturbance of the peace consequent upon attempts being made by the parties respectively to remove the timber. The result was that on the 7th of June last, a lessee of the second party was bound down to keep the peace, and, on the 9th June, the present proceedings were instituted between the parties, the lessee not being made a party to these proceedings. All that the Magistrate finds in this case is this. He says: "It appears from the evidence of the witnesses produced by the first party that they were driven away by the men of the second party, and have been unable to enter the forest and remove the timber which they alleged to have been cut by them. This happened before the time of the initial proceedings, and that state of things still continues. Further, it appears that the men of the second party have been able to bring out the timber which was cut, with the exception of a few trees, which were cut, as is alleged, by a man who has since died." Upon these two facts being found, the Magistrate came to the conclusion that the possession of the second party was established when these proceedings were instituted. Having regard to the nature of the property in dispute, these two facts, found in favour of the second party, could not constitute legal possession of the second party at the time the proceedings were instituted. The first

(1) I. L. R., 11 Calc., 365.

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party is entitled to assume that on the occasion preceding the one in which the dispute arose, his men were allowed to cut and remove timber in the forest without any disturbance of peace. There is evidence adduced by him on this point which has not been disbelieved by the Deputy Magistrate. He is, therefore, entitled to say that for the purposes of the question of law which has been raised before us, and for that purpose only, this fact should be assumed in his favour. If this contention be conceded, it seems to us to follow that what happened in March last could not have the effect of putting the first party out of possession; they would only be acts disturbing the possession of the first party. Having regard to the nature of the property in dispute, and the mode in which possession may be exercised over the property, we think that in order to find which party was in possession when the proceedings were instituted, it is necessary to enquire which party was in the undisturbed possession of the land in dispute by felling timber and removing the same without objection on the occasion immediately preceding the one in which the dispute arose; and whichever party be found to have been in possession on that occasion, should be presumed to have possession at the time when the proceedings in this case commenced.

We desire to guard ourselves from being understood to express any opinion on the question of possession—that question is left to be decided by the Joint Magistrate. We simply make the assumption of fact, which the first party contended should be made, in order to decide whether the finding of the Joint Magistrate is sufficient *in law* to dispose of the case.

We set aside the order of the Joint Magistrate, and remit the record of the case to him, in order that it may be decided, on the evidence now on the record, with reference to the observations made above.

Order set aside and case remanded.

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF ASHGHAR REZA AND ANOTHER. 1889

ASHGHAR REZA AND ANOTHER (A MINOR, THROUGH HIS NEXT FRIEND J. H. LEWIS) (PLAINTIFFS) *v.* HYDER REZA AND OTHERS (DEFENDANTS).* *February* 20.

Appeal to Privy Council—Concurrence of two Courts on facts—"Affirming" judgment of Lower Court—Civil Procedure Code (Act XIV of 1882), s. 596—Substantial questions of law—Case disposed of on facts.

Where the issues in a case involved questions both of law and fact, and the Subordinate Judge had decided against the plaintiff on two issues of fact, sufficient for the disposal of the case, without trying the other issues, the High Court found on those two issues substantially in favor of the plaintiff, but raised a further question of fact on the evidence and decided that against him, coming finally to the same conclusion on the facts as the Subordinate Judge, though not agreeing with him on all his findings or in the reasons on which they were based :

Held, on an application for leave to appeal to the Privy Council, that the High Court did not "affirm" the judgment of the Lower Court within the meaning of s. 596 of the Civil Procedure Code.

Held, also, assuming the judgment of the Lower Court was affirmed by the High Court, that there were substantial questions of law in the case which entitled the plaintiff to appeal, notwithstanding that such questions might be immaterial to the decision of the case.

THIS was an application for leave to appeal to the Privy Council from a decision of the High Court (NORRIS and BEVERLEY, JJ.), dated 26th May 1888.

The plaintiffs in the suit were Syed Ashghar Reza and Syed Dilawur Reza, two of the sons of one Raja Ahmed Reza by his wife Rani Roushan Jehan, and the suit was brought, to recover possession of a share of certain property, against Syed Hyder Reza and Syed Sufdar Reza, the sons, and Muni Bibi, the daughter, of Raja Syed Ahmed Reza by another wife Rani Afzulunnissa, (who died in 1860), and also against Syed Lutf Ali Khan, to whom the other defendants had transferred the property claimed.

The subject of the suit was a share of 11 gundas of zemindari Surjapore which was purchased at a sale in execution of a decree

* Application No. 21 of 1888 for leave to appeal to Her Majesty in Council.

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in the name of one Kasim Ali in February 1851 ; and a share of a putni mehal called Bhata Bhaugulpore which was purchased in 1867 in the names of the defendants Hyder Reza and Sufdar Reza. As to these properties the plaintiffs alleged that the 11 gundas share of the zemindari was purchased by and with the money of Ahmed Reza in the name of Kasim Ali, who was a servant of his, and that Kasim Ali subsequently, in 1854, executed an ikrarnama as to his purchase in favour of Ahmed Reza, though in the name of his wife Afzulunnissa ; and as to the share of the putni mehal, that it had been similarly purchased by Ahmed Reza with his own money in the names of Hyder Reza and Sufdar Reza. The plaintiffs, therefore, claimed these properties as heirs of Ahmed Reza, who died in May 1870, and also claimed to have set aside certain mortgages and deeds of sale executed by Hyder Reza and Sufdar Reza in favour of the defendant Lutf Ali Khan.

The suit was valued at Rs. 4,70,811-14 annas. The defence (the defendant Lutf Ali Khan alone putting in a written statement and defending the suit) mainly was that the purchase of the 11 gundas share of Surjapore was made by Kasim Ali for Afzulunnissa, in whose favour the ikrarnama was executed by him, in 1852, whereby he acknowledged that he had purchased the share for her and with her money ; and that the share of the putni mehal was purchased, not by Ahmed Reza benami, but by the defendants Hyder Reza and Sufdar Reza for themselves and in their own names ; and that even if the properties had been acquired by and with the money of Ahmed Reza, he had intended them to be and had given them for the benefit of Afzulunnissa and Hyder Reza and Sufdar Reza, respectively, and the beneficial enjoyment of those properties had been with those persons, and not with Ahmed Reza. Other defences were raised which are shown by the following issues, which were those settled at the hearing before the Subordinate Judge :—

"(1) Whether the claim of the plaintiffs, or any portion of it, is barred by limitation or not?

"(2) Whether Ahmed Reza purchased the disputed 11 gundas of zemindari Surjapore furzi in the name of Kasim Ali and got Kasim to execute an ikrarnama to him in the name of Afzulunnissa, and the disputed 7 annas and 9 gundas share of putni

taluk Bhata Bhaugulpore, &c., furzi in the names of Hyder Reza and Sufdar Reza or not?

"(3) If the purchases were benami, whether they were made for, and the properties were gifts to, Afzulunnissa, Hyder Reza and Sufdar Reza or not?

"(4) Whether the defendant Lutf Ali Khan is *bonâ fide* a mortgagee and purchaser after due enquiry for value or not?

"(5) Whether Ahmed Reza admitted the title of Afzulunnissa, Hyder, and Sufdar, and put in the petition mentioned in paragraph 9 of the written statement, and whether the statements regarding collection of rent in paragraph 10, the admission of Roushan Jehan mentioned in paragraph 15, and the purchases by the plaintiffs spoken of in paragraph 13 are true? If so, under what circumstances were they made, and are the plaintiffs estopped thereby from maintaining the suit?

"(6) Did Roushan Jehan and Hamidunnissa *alias* Muni Bibi relinquish their shares?

"(7) What shares have the plaintiffs received on the death of their father, and to what shares in the properties are they entitled?

"(8) Are the plaintiffs entitled to mesne profits? If so, to what, and for what period, and from whom?

"(9) Whether the suit is maintainable under s. 317 of the Civil Procedure Code."

The Subordinate Judge, after holding that the suit was not barred by lapse of time, found that the 11 gundas share of Surjapore was purchased by and with the money of Ahmed Reza in the name of Kasim Ali, who was his *karpurdaz* and servant; that the transfer by the ikrarnama was intended to be for the benefit of Afzulunnissa, and operated as a gift to her of that property, of which thenceforth she had the beneficial enjoyment; that the purchase of the share of the putni mehal was made by Ahmed Reza with his own money, but with the intention of providing for, and as a gift for, the benefit of Hyder Reza and Sufdar Reza; that that share was not for a period of more than 12 years after Ahmed Reza's death considered by his heirs to be part of his heritage, but was property of which Hyder Reza and Sufdar Reza and not Ahmed Reza were in beneficial enjoyment

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from the time of the purchase. In consequence of these findings on the 2nd and 3rd issues, the Subordinate Judge considered that the decision of the other issues was unnecessary, and dismissed the suit.

The plaintiffs appealed to the High Court, valuing their appeal at the same amount as the original suit.

The High Court, on appeal, agreed with the Subordinate Judge in finding that the purchase of the 11 gundas of Surjapore was originally a benami transaction, that is, a purchase by Ahmed Reza with his own money in the name of Kasim Ali, his servant; but they were of opinion that it was not purchased on behalf of or for the benefit of Afzulunnissa, and that when it was transferred into the name of Afzulunnissa by the ikrarnama, it was simply a transfer from one benamidar to another; but that at some time before her death, probably at the time of his marriage with Roushan Jehan in 1859, Ahmed Reza made a gift of that property to, and afterwards treated it as being the exclusive property of, Afzulunnissa and her sons Hyder Reza and Sufdar Reza, the beneficial enjoyment of it up to that time having continued with Ahmed Reza. With regard to the purchase of the share of the putni mehal, the High Court held that it was made by Ahmed with money borrowed by him for that purpose, and was intended to enure for the exclusive benefit of Hyder and Sufdar Reza. They summed up their conclusion as follows:—

"Our conclusion, therefore, upon the whole case is much the same as that arrived at by the Subordinate Judge, though we may not agree with him upon each and every one of his findings, or in all the reasons upon which they are based. We find, however, that the 11 gundas zemindari, though originally acquired by Ahmed Reza, was given by him to Afzulunnissa or her sons in or about the year 1859, and was thenceforward acknowledged and dealt with by him as their property. We find further that the putni was acquired by him for Hyder and Sufdar, and was always treated as their exclusive property. That being so, the plaintiffs can have no right or interest in either of these properties as the heirs of Ahmed Reza, and we think that their suit was rightly dismissed.

"Under these circumstances, it seems unnecessary to go into

the other questions that were argued before us with great ability and at considerable length. Our finding being that the plaintiffs had no title, it becomes immaterial to consider whether or not the respondent made due enquiry into their claim, or what may be the shares to which they are entitled, or to what extent the respondent is liable for mesne profits.

"It might have been contended that upon our finding that the 11 gundas zemindari was given to Afzulunnissa in 1859 or 1860, the plaintiffs would be entitled to recover in this suit two-thirds of the share in that property (admittedly a one-fourth share) which would have devolved upon her husband Ahmed at the time of her death. We have accordingly heard Counsel upon this point; and on a full consideration of the arguments advanced, we are of opinion that the plaintiffs are not entitled to any relief on this ground. In the first place we think that they ought not to be allowed to take advantage of a new case, which not only was not put forward by them in their plaint, but which is wholly inconsistent with the case therein disclosed. In the case of *Eshan Chunder Singh* v. *Shama Churn Bhutto* (1), as well as in many other cases, their Lordships of the Privy Council have pointed out the absolute necessity that 'the determinations in a case should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made.' Now the plaintiffs came into Court upon the allegation that the properties claimed were exclusively the properties of their father Ahmed at the time of his death. They distinctly denied that Afzulunnissa or her sons had any beneficiary interest in them during Ahmed's lifetime. This title they have failed to prove. The finding of this Court, as of the Lower Court, is that the properties in suit were not the properties of Ahmed, but of Afzulunnissa or her sons. This being so, we think they cannot be allowed to turn round now and set up another quite different title, *viz.*, a title through Ahmed as one of Afzulunnissa's heirs. They denied that Afzulunnissa ever had any title to the 11 gundas, and they cannot now take advantage of the finding that the title was in her to set up an entirely new case, and in point of fact, not-

(1) 11 Moore's I. A., 7.

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withstanding the finding of the Lower Court, we do not find that this new case was even foreshadowed in the memorandum of appeal."

The grounds set forth in the petition for leave to appeal were mainly that the defendants should not have been allowed to set up and to succeed upon a case, *viz.*, the gift by Ahmed Reza to Afzulunnissa, not put forward by them in their written statement, nor made one of the issues in the suit; that the alleged gift, if made, was invalid under the Mahomedan law; that documentary evidence—among other documents a plaint in another suit—had been admitted which was not legally admissible in evidence.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *R. E. Twidale*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Nilakant Sahai*, and Baboo *Saligram Singh* for the petitioners.

The *Advocate-General* (Sir *G. C. Paul*) Mr. *C. Gregory*, Mr. *M. L. Sandel*, Munshi *Mahomed Yusoof* and Baboo *Karuna Sindhu Mukerji*, opposed the petition.

The contention on behalf of the petitioners was that, though both Courts had found against the petitioners on certain issues of fact, the Courts did not agree on the facts which they respectively found against the petitioners, and, therefore, though both Courts came to the same conclusion, the High Court could not be said to have affirmed the decree of the Lower Court within the meaning of s. 596 of the Civil Procedure Code. Even, however, if the High Court could be said to have affirmed the decree of the Subordinate Judge, yet there were substantial issues of law raised in the case which would entitle the petitioners to an appeal under that section. The case of *Gopinath Birbar* v. *Goluck Chunder Bose*, decided by Garth, C.J., and Prinsep, J., on 9th August 1884 (1) was referred to in support of the application. The valuation of the appeal was admittedly sufficient.

(1) *Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Prinsep.*
GOPINATH BIRBAR (APPELLANT) *v.* GOLUCK CHUNDER BOSE AND OTHERS (RESPONDENTS).*

Appeal to Privy Council—Decision of two Courts on facts in case in which are issues of fact and law—Right of appeal—Civil Procedure Code (Act XIV of 1882), *s.* 596—*Review of order granting leave to appeal.*

Where the issues in a case involved points both of law and fact, and the first Court having decided these issues against the plaintiff and dismissed the suit, the

* Application for appeal to Privy Council, No. 19 of 1884.

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The petition was opposed mainly on the ground that, inasmuch as the petitioners sued for a share of certain property by inheritance from Ahmed Reza, and both the Subordinate Judge and the High Court had held on the evidence that they could

High Court agreed with the finding of the first Court on the first issue, which was one of fact sufficient for the disposal of the case, and gave no decision on the other issues:

Held, on an application for leave to appeal to the Privy Council, that the plaintiff was, under the last clause of s. 596 of the Civil Procedure Code, entitled to appeal, such an appeal involving questions of law within the meaning of that section, notwithstanding that such questions might be immaterial for the decision of the case.

Per PRINSEP, J.—An order granting leave to appeal to the Privy Council is open to review.

THIS was a re-hearing of an application for leave to appeal to the Privy Council.

The application was originally made to PRINSEP, J., sitting as Judge in the Privy Council Department, and granted by him. An application for review of the order granting leave to appeal was made to PRINSEP, J., and opposed on the ground that such an order was not open to review. On that application PRINSEP, J., said:—

"This is an application for review of my order granting a certificate to the opposite party to appeal to the Privy Council. It is contended that such an order is final, and not open to review. The only reported case on the subject is that of *Ameerunnessa Begum* v. *Inderjeet Koonwar* (1), and both parties claim that judgment as a precedent in their favour. The facts are not sufficiently stated in the judgment for me to regard that case as a precedent.

"No sufficient reason occurs to me for refusing to exercise this power of reviewing my previous order. It would seem rather from the position which the Chapter of the Code regarding appeals to the Queen in Council occupies with regard to reviews of judgments that the Legislature contemplated that the latter should apply to such appeals. As *primâ facie* there are good grounds for reconsidering the points involved, I grant the application for review."

The application for leave to appeal was heard by GARTH, C.J., and PRINSEP, J., and in the judgment delivered on that re-hearing by GARTH, C.J., the facts are for this report sufficiently stated.

Mr. *R. E. Twidale* and Baboo *Abinash Chunder Banerjee* for the appellant.

Baboo *Chunder Madhub Ghose*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Karuna Sindhu Mookerjee* for the respondents.

GARTH, C.J.—This is a rehearing of an application made to Mr. Justice Prinsep in the Privy Council Department.

(1) 5 W. R., Mis. 97.

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not succeed, because the property in which they sought to share did not belong to Ahmed Reza at his death, that was such a concurrent finding on the facts and affirmance of the Subordinate Judge's decision by the High Court, as precluded the petitioners

The suit was brought by the plaintiff, claiming to be the son and heir of Rajah Ram Chunder Munraj Mohapatter. The case was an important one, and the value of the subject-matter of the suit was far beyond Rs. 10,000.

The main issues raised were as follows :—

"Is the plaintiff the son of Rajah Ram Chunder Munraj Mohapatter and by what wife?

"Was there anything in the way that Rajah Ram Chunder Munraj Mohapatter succeeded his predecessor tending to make the Rajgi to be regarded as self-acquired property for the purposes of this litigation?

"Does the Mitakshara law apply, and, if not, what law?

"Does the Pachis Sewal apply, and, if so, how, and to what extent?

"Was the alienation for necessary reasons?

"Were defendants 1 and 2 innocent purchasers as alleged?

"Was the sale valid: can it be set aside?" So that they admittedly involve points of fact and law.

The first Court decided these issues against the plaintiff, and dismissed the suit. On appeal to the High Court the learned Judges of the Division Bench agreed with the first Court on the question raised by the first issue; namely, whether the plaintiff was really the son of the Rajah? Having decided this question of fact against the plaintiff, they dismissed the appeal, giving no decision upon the other issues.

The plaintiff then applied to Mr. Justice Prinsep, as the Judge of the Privy Council Department, for leave to appeal to Her Majesty in Council. The application was opposed upon the ground that the decision of both Courts upon the question of fact was fatal to the plaintiff's case; and that there was, therefore, no appeal to the Privy Council, having regard to the last paragraph of s. 596 of the Code.

My brother Prinsep however decided that, as the appeal involved questions of law as well as of fact, he ought to allow it; and he was confirmed in that view by a decision of Mr. Justice PONTIFEX in the case of *Moran* v. *Mittu Bibee* (1).

The defendants applied for a review, and simultaneously appealed against this order. Mr. Justice PRINSEP admitted the application for a review, and the defendant having withdrawn his appeal the matter has been re-heard.

Although we are by no means clear what the intention of the Legislature was, we think that, having regard to the language of s. 596, we ought to allow the appeal. It has been contended that the true meaning of the section is, that if the two Lower Courts have decided some question of

(1) I. L. R., 2 Calc., 228.

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from appealing. With such a final decision on the facts, any question of law became immaterial.

The following judgment was delivered by

GHOSE, J.—This is an application for leave to appeal to Her Majesty in Council. The value of the subject-matter of the suit is far above ten thousand rupees, and the case seems to be an important one.

The suit out of which this appeal arises was one brought by Syed Ashghar Reza and Syed Dilawar Reza, as heirs of one Syed

fact against the plaintiff which is essential to his right to maintain the suit, no appeal lies to the Privy Council, although, if the appeal were preferred, it would involve questions of law, besides the question of fact. In other words, that unless in such a case the appeal to the Privy Council *necessarily* depends upon some question of law, it ought not to be admitted.

We think it very possible that this may have been the intention of the Legislature ; and that their Lordships of the Privy Council may put that construction upon the section. But we agree with Mr. Justice Pontifex that this is not *the necessary intendment of the words ;* and that, unless it is so, we think we ought not to deprive the plaintiff of an appeal.

The words of the section are, that " where the decree appealed from affirms the decision of the Court below, the appeal must involve some substantial question of law." Now here, if the appeal is allowed, it will involve substantial questions of law. That is to say, questions of law will be raised in the appeal, as well as the question of fact. It is true, that those questions of law may become immaterial, if the question of fact is decided against the plaintiff ; but still it seems impossible to say that the appeal does not involve questions of law.

It is argued that, as the High Court have decided the question of fact only, and have declined to decide the questions of law, the lattter questions would not be before the Privy Council on appeal. But those questions are raised by the issues : and it is an admitted fact that upon the appeal the Privy Council would have all the materials before them to enable them todecide the whole case.

We have been referred to a case of *Joymungal Koiri* v. *Mokhun Koiri* (1) decided by the Privy Council as an authority in the defendants' favour. But we find that there the only question raised on appeal was a question of fact. The grounds of appeal involved no question of law at all.

We think, therefore, that the appeal should be allowed, and both parties will then have the opportunity of arguing the point again before their Lordships.

As regards the costs of the application, we think that they should follow the result of the appeal.

(1) 10 C. L. R., 611.

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Ahmed Reza, to recover possession of their share in two properties, one of the properties being an 11 gundas share of a zemindari, and the other, a certain putni mehal. The claim was made as against Syed Hyder Reza and Syed Sufdar Reza, their step brothers, being the sons of Syed Ahmed Reza by another wife Afzulunnissa, and as against Syed Lutf Ali Khan who has derived his title under a sale from those two individuals.

As to the first-mentioned property, namely, 11 gundas of the zemindari, it appears that it was purchased at an execution sale in the year 1851, in the name of one Kasim Ali, and this individual subsequently executed an ikrarnama bearing date the 21st August 1852, in favour of Afzulunnissa, the mother of Hyder and Sufdar, admitting thereby that the purchase had been made from the money of that lady, and that the property belonged to her.

The plaintiffs' case was that the property had been purchased by Ahmed Reza with his money in the benami of Kasim, and that he, Ahmed, caused Kasim to execute the said ikrarnama in the name of his wife for his own benefit, and that he was in possession, and not Afzulunnissa.

The case on the other side was that the purchase in 1851 by Kasim Ali was a purchase for the benefit of Afzulunnissa and with her money; that it was really transferred to her under the ikrarnama, and that since the purchase she, Afzulunnissa, was in possession, and not Ahmed Reza. A further plea was, however, set up by the defendant, that even supposing that the purchase in 1851 was made with the money of Syed Ahmed Reza, it should be taken to have been a purchase made for the benefit of, or a gift made to, Afzulunnissa and her sons.

In regard to the other property, namely, the putni, it appears that it was purchased in the year 1867 in the names of Syed Hyder Reza and Syed Sufdar Reza. The plaintiffs' case was that it was purchased with the money of Syed Ahmed Reza, and that it belonged to him; whereas the case of the other side was that it was really a purchase made by Syed Sufdar Reza and his brother, through their guardian, but that even if it be the case, that the money with which the purchase was made was money which belonged to

Syed Ahmed Reza, it should be taken that Syed Ahmed Reza intended it to be an acquisition for the benefit of, or as a gift to, Syed Hyder Reza and Syed Sufdar Reza.

The Subordinate Judge held, so far as the first-mentioned property is concerned, that the purchase was made by Syed Ahmed Reza with his own money in the name of his mukhtear, Kasim Ali, and that the ikrarnama, bearing date August 1852, operated as a transfer of the property from Syed Ahmed Reza to his wife Afzulunnissa. He seems to have also found that the beneficial enjoyment of the property in question since the execution of the ikrarnama was with Afzulunnissa, and not with Syed Ahmed Reza.

With regard to the putni the Subordinate Judge held that, although it was purchased with money borrowed by Syed Ahmed Reza, still as he had received various sums of money as profit from the 11 gundas share of the zemindari belonging to Syed Hyder Reza and Syed Sufdar Reza, and as he wanted to make a provision for these two young persons, he made the acquisition for their benefit. He also found that the beneficial enjoyment of this property was with them and not with Syed Ahmed Reza.

The result was that the suit was dismissed.

On appeal to this Court, the learned Judges have agreed with the Subordinate Judge in holding that the purchase of the 11 gundas share of the zemindari in the name of Kasim Ali in 1851 was by Syed Ahmed Reza with his own money, and not by Afzulunnissa; but they have come to a very different conclusion as regards the effect of the ikrarnama of the year 1852. They have held that it did not operate as a transfer from Syed Ahmed Reza to Afzulunnissa, as was held by the Subordinate Judge; but that it was really a transfer from the name of one benamidar to that of another. And as far as I can understand the judgment of this Court, the Judges seem to have also held that, notwithstanding this ikrarnama in favour of Afzulunnissa, the beneficial enjoyment of the property continued to be, as it hitherto was, with Syed Ahmed Reza.

The learned Judges, however, have at the same time held that Syed Ahmed Reza some time in July 1859, when he married the plaintiff's mother Roushan Jehan, conceived the idea of

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making a gift of this property to Afzulunnissa, and this idea was given effect to about that time or shortly before her death, which took place in 1860; and this they have held to be proved by certain transactions of Syed Ahmed Reza in the years 1860, 1863 and 1869.

In regard to the putni the learned Judges seem to have taken pretty nearly the same view as that taken by the Lower Court, although they have not expressed any opinion as to whether Ahmed had any money in his hands belonging to Hyder and Sufdar.

In the result this Court has come to the conclusion, as the Lower Court did, that the plaintiffs are not entitled to recover any one of the two properties in question, and it has accordingly dismissed the appeal preferred by the plaintiffs.

Against the judgment pronounced by this Court the plaintiffs now ask for leave to appeal to Her Majesty in Council; and the first question that arises for consideration is, whether the decree sought to be appealed from affirms the decision of the Court below within the meaning of s. 596 of the Code of Civil Procedure.

The word "decree," as defined in s. 594 of the Code, "includes also judgment and order;" so that I may take it for the purposes of the matter before me, that "decree" means judgment. And the question then is, whether the judgment of this Court affirms the decision of the Subordinate Judge. No doubt it may be taken, as it was argued by the learned Advocate-General, that this Court has concurred with the Subordinate Judge in holding that the property at the time of the death of Syed Ahmed Reza did not belong to him, and that, therefore, the plaintiffs are not entitled to recover any share thereof; but it has come to this conclusion for reasons which to my mind are very different from those given by the Subordinate Judge. The learned Judges have held that the ikrarnama had not the effect of transferring the property from Ahmed Reza to Afzulunnissa; that the latter was but the benamidar for Ahmed; and that, notwithstanding the ikrarnama, the property continued to belong to Ahmed Reza.

If the judgment of this Court had stopped with their decision as regards the two questions upon which the Subordi-

nate Judge decided the case against the plaintiffs, *viz.*, as to the effect of the ikrarnama, and as to possession since that document, the plaintiffs would have been, as I understand it, entitled to recover. But then they go on to decide the case against them upon a totally different ground, *viz.*, that some years after the ikrarnama there was a gift by Ahmed to Afzulunnissa.

I therefore take it that the judgment of this Court does not affirm the decision of the Court below so far as regards the 11 gundas share of the zemindari. And if this is a right view of the matter, the petitioners are entitled to a certificate that the case is a fit one for appeal. But I may also say that the appeal which they present involves substantial questions of law. For instance, a question is raised whether the defendant was entitled to set up in appeal, and succeed upon, a case which he did not raise in the Court of first instance, and which was not involved in the issues raised between the parties. Another question is as regards the validity under Mahomedan law of the gift said to have been made by Syed Ahmed Reza to Afzulunnissa. Then there is the question raised as regards the admissibility of certain important documents, one of these documents being a certified copy of a plaint; and the question in regard to this is whether a plaint is a public document within the meaning of s. 77 of the Evidence Act.

It is not necessary to refer to the other points that are raised in this appeal.

I think upon the whole that the case is a fit one for appeal to Her Majesty in Council, and that it should be certified as such.

Let a certificate be granted accordingly, and the usual notice be issued.

J. V. W. *Application granted.*

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Tottenham, Mr. Justice Norris, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose, Mr. Justice Beverley and Mr. Justice Banerjee.

1889 *February* 27.

MODHUSUDUN SHAHA MUNDUL AND OTHERS (DEFENDANTS) *v.* BRAE (PLAINTIFF).*

Res Judicata—Evidence—Estoppel—Ex-parte decree, Effect of—Rate of rent —Rent suit—Civil Procedure Code (Act of 1882), s. 13.

A mere statement of an alleged rate of rent in a plaint in a rent suit in which an *ex-parte* decree has been obtained, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure was raised between the parties so that the defendant is concluded upon it by such decree.

Neither a recital in the decree of the rate of rent alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata*, assuming that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.

REFERENCE to a Full Bench made by Mr. Justice PIGOT and Mr. Justice RAMPINI. The following is the order of reference :—

"In these appeals the question is raised, as to the effect in a suit for rent, of a previous decree for rent between the same parties, or persons, whom the parties represent in interest.

"In appeal No. 1966 of 1887 the plaintiff has obtained a decree for rent at the rate of Rs. 113-9-7, the rate claimed in his plaint. The defendant contended that the rent was Rs. 70-8. On behalf of the plaintiff two decrees were put in, made by the Deputy Collector of Magura, one in 1861 and the other in 1863. Those decrees were made *ex-parte*. Translations are annexed to this reference.

"The first is a decree for Rs. 2-12-1-3 cowries, the rate of rent alleged by the plaintiff being stated in the decree to be Rs. 113-9-7 'more or less.'

* Full Bench on Special Appeals Nos. 1960 and 1966 of 1887, against the decrees of the Subordinate Judge of Jessore, dated 13th July 1887, reversing the decrees of the Munsiff of Magura, dated 18th February 1887.

"The second is for Rs. 13-10-3-3 cowries, the rate of rent alleged by the plaintiff being stated in the decree to be 'a variable rent' of Rs. 113-9-7. We do not understand that anything turns on the expression 'more or less' or 'variable' in the allegations of the plaintiff so recited.

"The plaints in these suits are not in evidence.

"In appeal No. 1960 of 1887 the plaintiff has obtained a decree at the rate of Rs. 43-15; the defendant contended that the rate was Rs. 30 only. On behalf of the plaintiff an *ex-parte* decree, made by the Deputy Collector of Magura in 1863, was put in for Rs. 10-7-7-2, arrears of rent, the rate of rent alleged by the plaintiff being stated in the decree to be 'a variable rent' of Rs. 43-15.

"It is not disputed that the parties in each of these appeals represent the parties between whom the above-mentioned *ex-parte* decrees respectively were passed.

"There is nothing before us to show that any of the *ex-parte* decrees were executed.

"The Lower Appellate Court in each case has made a decree in favour of the plaintiff, holding the defendant absolutely estopped, it not being shown that the decree was fraudulently obtained, or that the rate has been changed since the passing of the decree.

"It is contended on the part of the defendants, appellants, that in such a case no estoppel arises; or that, if any estoppel arises, it is limited to this, that the defendant is by it estopped from denying that the amount of arrears of rent for which the *ex-parte* decree was made, was due.

"The cases in this Court seem to us to conflict upon this question.

"We therefore submit the following questions to the Full Bench:—

First.—Whether an *ex-parte* decree for arrears of rent operates so as to render the question of the rate of rent *res judicata* between the parties?

Second.—Whether it so operates, if the rate of rent alleged by the plaintiff is recited in the decree, without any express declaration that the rate of rent so alleged has been proved?

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Third.—Whether it so operates, if the rate of rent alleged is expressly declared by the decree to have been proved?

Fourth.—Whether an *ex-parte* decree operates so as to render any question decided by the decree *res judicata*, in the absence of proof that such decree was executed?

"The third question does not, strictly speaking, arise in the present case; but it seems to us to be so connected with the general question before us, that we submit it in case the Full Bench should feel at liberty to answer it.

"The cases in this Court to which we refer are the following:—*Ram Sunder Tewari* v. *Srimunt Dewasi* (1); *Heera Lall Seal* v. *Joheer Mollah* (2); *Beerchunder Manick* v. *Ramkishen Shaw* (3); *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (4); *Birchunder Manickya* v. *Hurrish Chunder Dass* (5); *Nilmoney Singh* v. *Heera Lall Dass* (6); *Bhugirath Patoni* v. *Ram Loochun Deb* (7).

Baboo *Rash Behari Ghose* (with him Baboo *Saroda Churn Mitter*) for the appellant.

Ex-parte decrees cannot be used as estoppels. In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (4), the question was as to the effect of an *ex-parte* decree as evidence. The only question decided in *Beerchunder Manick* v. *Ramkishen Shaw* (3) was whether the decree was or was not admissible in evidence, and it was held it was for what it was worth. The judgment in this case is explained in *Birchunder Manickya* v. *Hurrish Chunder Dass* (5). *Ex-parte* decrees have been held not to be final decrees and not estoppels, but on a somewhat different ground, *viz.*, under s. 13, cl. 4 of the Civil Procedure Code; the mere statement of an alleged rate of rent in a plaint in a rent suit is not such a material allegation, as that without such allegation the plaintiff would be unable to obtain a decree at a different rate from that

(1) 14 B. L. R., 371; 10 W. R., 215.
(2) 20 W. R., 273.
(3) 14 B. L. R., 370; 23 W. R., 128.
(4) 23 W. R., 149.
(5) I. L. R., 3 Calc., 383.
(6) I. L. R., 7 Calc., 23; 8 C. L. R., 257.
(7) I. L. R., 8 Calc., 275.

alleged. See also *Nilmoney Singh* v. *Heera Lall Dass* (1) ; *Bhugirath Patoni* v. *Ram Lochun Deb* (2) ; *Heera Lall Seal* v. *Joheer Mollah* (3) ; see also *Goucher* v. *Clayton* (4) ; also the *Duchess of Kingston's case* (5).

Baboo *Upendro Nath Mitter* for the respondent.

Ex-parte decrees operate so as to render the question of rate of rent *res judicata.—Birchunder Manickya* v. *Hurrish Chunder Dass* (6) ; and *Puncharam Mundul* v. *Krishnapria Dasi*, [unreported (special appeal, No. 1271 of 1887, decided on the 22nd March 1888.)] The Court supposes in *ex-parte* decrees that the defendant denies the material statements made by the plaintiff.

The opinion of the Full Court was as follows :—

These cases being appeals from appellate decrees, it devolves upon this Bench, according to the practice of the Court in references to a Full Bench, to decide the appeals.

The questions referred to us relate to the effect to be given to the *ex-parte* decrees for rent mentioned in the reference, and arise by reason of a conflict in the decisions of this Court as to the effect to be given to such decrees. In the present case the *ex-parte* decrees were decrees of a Deputy Collector ; but the conflict of cases relates to the effect of decrees of Civil Courts generally, and with this wider question we think it proper to deal.

In *Birchunder Manickya* v. *Hurrish Chunder Dass* (6) the plaintiff sued the defendant for rents for the year 1279 at the same rate as had been decreed to the plaintiff for the year 1278 in a suit brought against the defendant with respect to the same property. The plaintiff relied upon an *ex-parte* decree obtained by him in that suit as showing the amount of rent due to him. The case came in 1874 before this Court in appeal from the decision of the District Judge of Tipperah, who had held that, inasmuch as no steps had been ever taken to execute the former decree,

(1) I. L. R., 7 Calc., 23 ; 8 C. L. R., 247.
(2) I. L. R., 8 Calc., 275.
(3) 20 W. R., 273.
(4) 11 Jur. N. S., 107.
(5) 2 Sm. L. C. (8th Ed.), 818.
(6) I. L. R., 3 Calc., 383.

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and it had become barred by limitation, it became inoperative and could not be used in evidence.

The case was referred by the Bench before which it came to a Full Bench, to determine the question whether the decree could be used in evidence.

The Full Bench held that the decree was admissible in evidence, the question of its value to be determined by the lower Courts. The case was remanded for a re-hearing. It went back to the District Judge, who found that, having been obtained *ex-parte*, the decree was of no value, and ought to be disregarded. He then sent back the case to the Munsiff to try the question of amount without reference to the former decree, which was accordingly done.

The case in 1878 again came on second appeal to this Court; it was heard by a single Judge; and from his decision an appeal was preferred under clause 15 of the Letters Patent.

It was held, on this appeal, that the decree was binding on the defendants. The learned Chief Justice said [in *Birchunder Manickya* v. *Hurrish Chunder Dass* (1)]:—

"The Judge pronounced the decree to be of no value as evidence, merely because it had not been contested by the defendants. In this we consider he was quite wrong; a decree obtained *ex-parte* is, in the absence of fraud or irregularity, as binding, for all purposes, as a decree in a contested suit. If it were not so, a defendant in a rent suit might always, by not appearing and allowing judgment to pass against him without resistance, prevent the plaintiff from ever obtaining a definite judgment as to what is the proper amount of rent due from him to his landlord."

According to this decision, therefore, an *ex-parte* decree in a rent suit is conclusive as to the rate of rent alleged in the proceedings in the suit, the question as to the rate becoming by virtue of the decree *res judicata*.

According to this decision, also, the fact that no execution had ever been taken out by the decree-holder upon his *ex-parte* decree, does not prevent the decree having, against the defendant, the conclusive effect attributed to it.

In *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (2), before Phear and Morris, JJ., which was a rent suit, the question arose

(1) I. L. R., 3 Calc., 383, at p. 388.

(2) 23 W. R., 149.

as to the effect to be given to an *ex-parte* decree for rent in a former suit between the plaintiff and the predecessor of the defendant. The question, as raised, was as to the effect to be given to such a decree as evidence. The learned Judges say:

"It seems to us, however, that the Munsiff was right in the view which he took of the effect of this decree considered as evidence between the parties, namely, that it is only evidence that Rs. 43 odd was, at the time when the decree was passed, due in respect of rent from the defendants to the plaintiff. The allegations made in the claim, so far as we can learn, were not converted into issues: the suit was tried *ex-parte* by reason of the non-appearance of the defendants; and no issues of fact seem to have been raised beyond the general issue involved in the claim, whether or not the Rs. 43 odd was due from the defendants to the plaintiff in respect of the rent claimed."

In the latter case, that of *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (1) the decree was considered only with reference to its value as evidence, and the question whether, so far as it was evidence, it operated as conclusive proof under s. 40, was not discussed. It is, however, a decision upon the question before us in this reference, inasmuch as it decided that the *ex-parte* decree then under consideration was relevant, not to the question raised as to the rate of rent, but only upon the question whether or not the Rs. 43 odd was, at the time the decree was passed, due in respect of rent from the defendant to the plaintiff.

Upon this question, therefore, the decisions in *Goya Pershad Aubustee* v. *Tarinee Kant Lahoree* (1) and *Birchunder Manickya* v. *Hurrish Chunder Dass* (2) are in direct conflict.

A later decision in this Court, not reported, and not mentioned in the reference to this Full Bench, was referred to in argument before us. It is the decision in the case of *Puncharam Mundul* v. *Krishna Pria Dasi* (Appeal from Appellate Decree, No. 1271 of 1887, decided 22nd March 1888).

In that case the learned Judges arrived at the same conclusion as that accepted in the case of *Birchunder Manickya* v. *Hurrish Chunder Dass* (2). They say:—

"When an undefended suit goes to trial, the plaintiff is put in the same position that he would have been if the defendant had appeared and simply said 'I deny all your allegations,' in which case the plaintiff would have to prove everything which would be necessary for him to prove in order

(1) 23 W. R., 149. (2) I. L. R., 3 Calc., 383.

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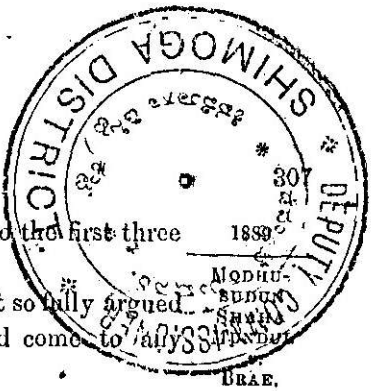
to make out his case, and therefore every material allegation in his plaint may be said to be denied because he has to prove them. When therefore this matter came before the Judge under these circumstances, the plaintiff had to prove that the defendant was his tenant of the tenure in question, and that the rent which the defendant had to pay on account of this tenure was at the rate of Rs. 7 and odd annas a year, and he also had to prove the amount of the rent in arrear, so that, all these allegations having to be proved, they are within the meaning of s. 13 of the Civil Procedure Code impliedly denied by the defendant."

It was argued before us that the statement in the plaint of an alleged rate of rent, in such a case, would not be an allegation so material that, in the absence of proof of it, the plaintiff could not obtain a decree, even although he were to show conclusively that the amount of rent claimed in the suit was actually due, on the footing of a different rate of rent from that mentioned in the plaint being the true rate.

We think this argument well founded. We think that, if at the hearing of such a suit, the plaintiff were to prove that the amount claimed by him as rent was actually due, although he did not establish the rate named by him in his plaint, he might nevertheless be entitled to a decree. That such a case might possibly arise is obvious. If it might, it follows that the statement of the rate of rent in the plaint is not necessarily an allegation so material that the determination of it in the affirmative is involved in the act of the Court in making a decree.

It follows from this that, in our opinion, the mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex-parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of s. 13 of the Code of Civil Procedure, was raised between the parties so that the defendant is concluded upon it by such decree.

We are of opinion, also, that neither a recital in the decree of the rate alleged by the plaintiff, nor a declaration in it as to the rate of rent which the Court considers to have been proved, would operate in such a case so as to make that matter a *res judicata;* assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.



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On the above assumption our answer, therefore, to the first three questions is in the negative.

As to the fourth question, the matter was not so fully argued before us as to make it desirable that we should come to any decision upon it.

The result is that we allow the appeals, set aside the decrees of the Lower Appellate Courts in both suits, and remand the cases for a decision on the merits. The respondent to pay the costs of the appeal in each case.

T. A. P. *Appeals allowed.*

PRIVY COUNCIL.

HEWANCHAL SINGH AND ANOTHER (PLAINTIFFS) *v.* JAWAHIR SINGH (DEFENDANT.)

P. C.*
1888
November 3.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Redemption right of—Redemption claimed under terms of mortgage—Insufficient tender of mortgage money—Transfer of Property Act (IV of 1882), ss. 60, 83, and 84.

According to the judgment of the Appellate Court below, a mortgagor, having liberty by the terms of his mortgage to redeem at the end of its second year, on payment of the whole of the principal and interest, was not entitled to a decree for redemption, in a suit brought after the close of the second year, on showing only that in the first half of the second year, the principal money had been deposited in Court, and that for the interest, for both years, decrees had been obtained by the mortgagee against him, before his suit was instituted. The above not showing payment or tender of the interest, of which payment was secured by the mortgage, an appeal was dismissed.

APPEAL from a decree (9th November 1885) of the Judicial Commissioner, reversing a decree (30th July 1885) of the District Judge of Sitapur. A mortgage, dated 9th February 1883, secured repayment of Rs. 14,500 with interest, by the appellants to the respondent, and contained the following: "The first condition is that the term of the mortgage has been settled as eight years; within this term the mortgage may be redeemed upon payment of the entire sum, according to the conditions of the mortgage-bond at the close of the second, fourth, or

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

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eighth year. The second condition is that interest shall be paid year after year at one per cent. per mensem, and that if the mortgagor fail to pay interest at the end of any year, the mortgagee shall be at liberty to realize the interest and costs by suit." The mortgagors made default in payment of the interest Rs. 1,740, due at the end of the first year, and for this a decree was obtained by the mortgagee on the 2nd May 1884. On the 30th June 1884 (*i.e.*, in the first half on the second year, and before its close) the mortgagors brought into Court the principal amount only, Rs. 14,500, and made an application, purporting to be under the 83rd section of the Transfer of Property Act, IV of 1882, asking to have the mortgagee summoned, and the above sum credited in the deposit account, and paid, in order that the mortgagors might then redeem.

The District Judge, on the ground that the mortgagors had, by the deed, no right of redemption before the end of the second year, dismissed the application on the 23rd September 1884.

On the 14th and 27th January 1885, the mortgagee notified to the mortgagors that he was willing to accept the mortgage money and reconvey, but that if they did not so redeem, they could not do so till the end of the fourth year.

The appellants did no more, leaving the principal money in Court, and they did not, at the close of the year, renew their application under the 83rd section, or pay into Court, or to the mortgagee, the interest due for the second year. For this the mortgagee sued, and obtained a decree, on the 15th May 1885, in the Court of the Subordinate Judge.

In that suit the mortgagors raised, in effect, a similar question to the present, contending that, as they had previously deposited the principal money, no interest was due for the second year, reference being had to the 84th section of Act IV of 1882; but the Subordinate Judge held the mortgagee entitled to the interest due for the second year. On the day of the date of that decree the mortgagors filed their plaint in the present suit, in which they contended that, as the defendant-mortgagee had obtained a decree for the first year's interest, and had no right to interest for the second year, he having refused to accept the principal amount which was still in

deposit, they, the plaintiffs, were entitled to redeem, on payment of the sum deposited, or such amount as might be found due to the mortgagee, on a correct and valid account being made up.

The issues raised questions as to the plaintiffs' right of redemption in the second year, and as to the sufficiency of their tender.

The District Judge held that, as the suit had been instituted after the expiration of the second year of the mortgage, one of the periods at which it was redeemable by its terms, when the principal amount was in deposit in Court, and the mortgagee had obtained a decree for the interest of that year, "the plaintiffs' tender was sufficient on the day of the suit." He stated in his judgment that on the 25th June 1885, *i.e.*, about six weeks after the institution of the suit, the mortgagee had attached the deposit in Court, in satisfaction of his decree for the second year's interest.

The Judicial Commissioner, on the mortgagee's appeal, reversed this decree, referring to the fact that on the 9th February 1885, interest had not been paid, nor tendered, nor placed at the mortgagee's disposal by deposit in Court. He held that, therefore, the condition relating to redemption had not been fulfilled at the close of the second year, when the suit was brought, and that it ought to have been dismissed.

In this appeal it was alleged that the decrees for interest obtained by the mortgagee, and the deposit of the principal in Court, had left nothing due under the mortgage.

Mr. *J. D. Mayne* appeared for the appellants.

Mr. *R. V. Doyne*, and Mr. *Theodore Thomas*, for the respondent, were not called upon.

The appellants' case having been stated, LORD FITZGERALD intimated that the deposit, or tender, at a proper time, of the mortgage money, which included the interest due, had not appeared; and their Lordships dismissed the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

CRIMINAL APPEAL.

Before Mr. Justice Macpherson and Mr. Justice Trevelyan.

THE GOVERNMENT OF BENGAL *v.* UMESH CHUNDER MITTER AND OTHERS.*

1888
November 6.

Attempt to commit offence—Attempt to cheat—Currency Office—Application for payment of lost halves of Currency Notes.

A man may be guilty of an attempt to cheat although the person he attempts to cheat is forewarned and is therefore not cheated. *R.* v. *Hensler* (1) referred to.

M wrote a letter to the Currency Office at Calcutta, enclosing the halves of two Government currency notes, stating that the other halves were lost, and enquiring what steps should be taken for the recovery of the value of the notes. The Currency Office, having, upon enquiry, discovered that the amount of the notes had been paid to the holder of the other halves and that the notes had been withdrawn from circulation and cancelled, sent *M* the usual form of claim to be filled up and returned to it. It appeared from the evidence that the Currency Office never contemplated paying *M* in respect of the notes. The form was filled up and signed by *M* and returned by him to the Currency Office.

Held, that, although there was no intention on the part of Currency Office to pay the amount of the notes, *M* was guilty of an attempt to cheat.

THIS was an appeal from an order of acquittal passed on the 7th September 1888 by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta. Umesh Chunder Mitter was charged under s. 511 of the Penal Code with having, in the month of May 1888, at the Government Currency Office in Calcutta, attempted to cheat the Assistant Comptroller General, in behalf of the Government of India in charge of the Paper Currency Department, by attempting to deceive him, and thereby fraudulently and dishonestly induce him to deliver to him (the said Umesh Chunder Mitter) the sum of Rs. 40, the value of two Government currency notes, Nos. $\frac{A}{73}$ 21687 and $\frac{A}{74}$ 61346 for Rs. 20 each, and Hem Chunder Chatterjee and two others were charged under s. 116 of the Penal Code with having at or about the time and place aforesaid aided and abetted the said

* Criminal Appeal No. 3 of 1888, against the order of acquittal passed by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 7th of September 1888.

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Umesh Chunder Mitter in the commission of the offence of cheating.

After the examination of one witness on behalf of the defence the Magistrate stopped the case and acquitted the prisoners.

The Crown appealed to the High Court.

The facts of the case are fully stated in the judgment of the High Court.

The *Advocate-General* (Sir *G. C. Paul*) and Mr. *Roberts* for the Government of Bengal.

Mr. *Palit* for Umesh Chunder Mitter.

Mr. *M. Ghose* for Hem Chunder Chatterjee and Haran Chunder Chatterjee.

Mr. *Allen* for Jadub Chunder Gangooly.

The judgment of the Court (MACPHERSON and TREVELYAN, JJ.) was as follows:—

This is an appeal from an acquittal. The first accused was charged with attempting to cheat. The other prisoners were charged with aiding and abetting him in the commission of the offence of cheating.

After one witness had been examined for the defence, the Magistrate stopped the case and acquitted the prisoners.

When we first heard this appeal the Advocate-General appeared for the Crown. At the conclusion of his opening address we held that there was no case against Haran Chunder Chatterjee, and accordingly we discharged him. We then heard Counsel for the other accused and the Advocate-General in reply. After consideration we discharged the accused Jadub Chunder Gangooly, and expressed our opinion that the Magistrate ought not to have stopped the case for the defence so far as the remaining two accused were concerned. We gave them an opportunity of calling evidence before us. We have since heard such evidence as has been produced on behalf of the accused Umesh Chunder Mitter and Hem Chunder Chatterjee, and must now deal with the case as completed.

Although we are told that in dismissing the case the Magistrate made some statement, he did not record his reasons for

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acquitting, and therefore we have not the advantage of knowing the nature of, or the grounds for, his opinion.

There is no serious difficulty about the facts of this case. The chief questions depend upon the effect to be given to those facts, and the inferences to be derived from them.

It is contended that the facts proved do not disclose an offence, and therefore it is desirable to see what are the undoubted facts of this case.

On the 23rd of May last the principal accused Umesh Chunder Mitter sent in to the Currency Office a letter (Exhibit A), enclosing two half currency notes for Rs. 20 each, stating that the other halves were lost from his box where he kept them, and asking what steps should be taken for the recovery of the money.

On receipt of this letter, Mr. Keene, the Assistant Comptroller-General in charge of the Currency Office, caused a search to be made in the Registration Branch of his office to see if there was any other claim against the two notes. On such search it was found that the amount of the notes had been paid to the holder of the other halves.

Mr. Keene then caused a document, which is marked Exhibit D, to be sent to Umesh Chunder Mitter. This was sent on the 28th of May, with a covering letter which treated Umesh Chunder's letter as an application for the payment of the value of the notes, and requested him to answer the questions embodied in the claim.

D is a form of claim with questions to be answered by the claimant.

As to his sending this form Mr. Keene states: "My object in sending out D was, believing these men were attempting to cheat, I wanted them to commit themselves." It is clear that when he sent out D, Mr. Keene did not contemplate paying Umesh Chunder Mitter in respect of the notes. Within Mr. Keene's experience no notes had been paid a second time, and, as he says, it ought not to happen that they are paid a second time. He was examined as to what he would do, in case, after payment to one applicant, a second applicant were to make out his title, but as such an event had not happened within his experience his answer is purely hypothetical.

The questions contained in this form of claim were filled in, signed by Umesh Chunder Mitter, and returned to the Currency Office on the 11th of June. This document, as filled up, is in form and intent an application for the payment of the money.

In answer to the questions contained in this form, Umesh Chunder Mitter stated that he was proprietor of the entire notes, that he received them from Haran Chunder Chatterjee of Gobardangah about October 1887, that he himself divided them in halves for the purpose of forwarding them to his cousin, that in December 1887 he lost the halves from his box, and that the persons who could give evidence as to his possession of the entire notes or as to the circumstances of the loss were Hem Chunder Chatterjee and Jadub Chunder Gangooly.

The Currency Office had paid in respect of the other halves in 1871. On the 17th of November 1871, those half notes were withdrawn from circulation, and on the 18th of the same month they were cancelled. It follows from this that the statement made by Umesh Chunder that he received the entire notes from Haran Chunder Chatterjee in October 1887 and divided them himself is untrue. On the 13th of June another printed form is sent to Umesh Chunder Mitter. It asks for a certificate from the party from whom the claimant received the whole notes, of his having paid the notes to the claimant, and also for a declaration of the persons named in the form Exhibt D, setting forth what they know as to the whole notes having been the property of the claimant and in his possession, and also as to the subsequent loss of the half notes in question. In answer to this letter Umesh Chunder Mitter sends in the certificate and declaration asked for.

The certificate purports to be signed by Haran Chunder Chatterjee and is as follows:—

"I do hereby certify that about seven or eight months ago I have sent two full notes of Rs. 20 each to Baboo Umesh Chunder Mitter of Areadah, the numbers of which are stated below $\frac{A}{73}$ 21687 for Rs. (20) twenty, $\frac{A}{74}$ 61346 for Rs. (20) twenty.

GOBARDANGAH:
The 28th June 1888. } HARAN CHUNDER CHATTERJEE."

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These numbers correspond with the numbers of the half notes sent in with the first letter. The statements in this certificate were unquestionably untrue to the knowledge of Umesh Chunder Mitter.

The declaration was written out by the accused Hem Chunder Chatterjee and was signed by him and the accused Jadub Chunder Gangooly, and was as follows :—

"We declare to the best of our knowledge that two full notes *viz.*, $\frac{A}{73}$ 21637 and $\frac{A}{74}$ 61346 of rupees twenty each were handed over to Baboo Umesh Chunder Mitter of Areadah about eight months ago when we were present there.

AREADAH: *The 2nd July*, 1888. } HEM CHUNDER CHATTERJEE. JADUB CHUNDER GANGOOLY."

The statements in this declaration were unquestionably untrue to the knowledge of Umesh Chunder Mitter and Hem Chunder Chatterjee.

On the 10th of July, Mr. Keene wrote to Umesh Chunder Mitter, asking him to come and see him at the Paper Currency Office on the 12th of that month at 1 P.M. He came at the appointed time. Mr. Hume, the Government Prosecutor, then questioned him. He was asked if the answers in D were true. He said they were. He was asked if he filled in the answers personally. He said no, but by his nephew Jagadish Chunder Gangooly. He further said that the answers were filled in under his orders, and in his presence at his dictation, and signed by the witnesses named in the form, which was also signed by himself. He was then specially asked about answer No. 2. He said: "Yes I am the proprietor of the entire notes, and I received them from Haran Chunder Chatterjee of Gobardangah in October 1887." Mr. Hume then asked Umesh if he had cut the notes in half. He said: "I think I must have, but am not sure. I have had many notes." Mr. Hume then showed him the certificate and declaration. He said that he knew them, and had received the certificate from Haran Chunder Chatterjee, and the declaration from Hem Chunder Chatterjee and Jadub Chunder Gangooly, and that he had sent the certificate and declaration to the Currency Office through Jadub Chunder

Gangooly. Mr. Hume then said to him: "Baboo, would you be surprised to hear that the other halves of the notes mentioned in your application were cancelled in the Currency Office in November 1871?" He said nothing then, but began to tremble. Mr. Hume said: "Baboo you are in a great mess. This is an attempt to cheat." He said: "I did not intend to cheat." Mr. Hume said: "You must explain that before a Magistrate." Mr. Hume said: "Why did you tell a lie in your application?" He said: "I did wrong sir." Mr. Hume then went with him into Mr. Keene's room, and in Mr. Keene's presence said: "Baboo, can you explain this matter?" He said: "I am a poor man. I have no money. I received the half notes from Haran Chunder Chatterjee, who told me to try and get the money from the Currency Office." There the interview ended.

On the next day warrants were issued; when arrested Hem Chunder Chatterjee produced a Bengali letter to which we shall hereafter refer.

This is the case for the prosecution.

There was no evidence against Haran Chunder Chatterjee, and the only evidence against Jadub Chunder Gangooly was that he had signed the certificate to which we have referred. His defence was that he signed that document without reading it and at the request of Umesh Chunder Mitter. It appears that he has always borne a good character, and although it rarely happens that a man signs a short document of this description without reading it, it is possible that his story may be true, and therefore we thought we could discharge him. As far as the remaining two accused are concerned, their defence is identical. We have heard a most elaborate argument, consisting of two main contentions. In the first place it is said that the acts committed at the most amount to a preparation to commit an offence, and in the second place it is said that it was the duty of the prosecution to show that the defendants in what they did acted dishonestly and that that has not been proved.

We do not think there can be any doubt that, apart from the second question to which we shall presently refer, the facts here amount to an attempt and not merely to preparation. The letter written on the 23rd of May is merely a letter of enquiry,

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and does not amount to an attempt. It is only a step in the preparation for the attempt. In sending it the writer did not commit himself. The document D, however, is an application for the payment of the money, and is the usual form in which such applications are made. An application for money is surely an attempt to obtain money. The application for money under a false pretence, as a rule, concludes the acts of the offender; unless anything occurs to prevent the payment he gets the money. Whether he gets the money or not does not necessarily depend upon any future act of his.

If authority were necessary for this proposition, the case cited to us of *Reg* v. *Hensler* (1) is only distinguishable by the circumstance that this particular question was not argued in that case. But that case, we think, disposes of another branch of the same contention raised by the respondents. It is said that because Mr. Keene, before the application was made to him, knew that the other halves were in the Currency Office, and knew that the matters stated by the applicant were untrue, and would not have paid the money to the applicant, the offence of cheating could not have been committed, and therefore the attempt to cheat could not have been committed. What Mr. Keene says only shows that the offence of cheating could not have been committed. A man may attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated. The case we have cited is on this question undistinguishable from the present case.

There the prisoner was indicted for attempting to obtain money by false pretences in a begging letter. When he paid the money, and apparently when he received the letter, the prosecutor knew its contents to be untrue. In his judgment the Chief Baron says: "This is an attempt by the prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained, because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post, the offence was committed." In the present case the money was withheld because of the information which Mr. Keene obtained in his office.

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Mr. Gay, who is Mr. Keene's official superior, says that if the claim, the declaration and the certificate had come to him he would, in the ordinary course, have ordered payment.

In *Reg* v. *Hensler* (1), as in the present case, counsel for the prisoner argued that, as the statutable offence could not have been committed, the prisoner could not be convicted of attempting to commit it. This argument was answered by two of the Judges in the following words: "*Blackburn, J.*—You may attempt to steal from a man who is too strong to prevent you. *Mellor, J.*—Or an attempt may be made to steal a watch that is too strongly fastened by a guard. Here the prosecutor had the money, and was capable of being deceived, and the prisoner attempted to deceive him."

One more point was raised on this question of attempt. It appears from Mr. Gay's evidence that before money is paid on a currency note it is usual to take a bond of indemnity from the claimant.

It is argued that in this case the attempt was not completed because the bond was not signed. We do not think there is anything in this argument. The application for the money is, we think, the attempt, or at any rate sufficient to constitute an attempt. The execution of the bond of indemnity is not a portion of the application. It is a precaution taken by the person sought to be cheated, and is an act which would ordinarily take place before the offence of cheating could be completed. As far as the applicant is concerned he would be willing to take the money without the indemnity. His offence is making the false pretence and asking for the money.

It seems to us that the execution of the bond of indemnity is not an act of the accused forming any portion of the acts which constitute the commission of the offence. The offence would be just as complete whether an indemnity was or was not insisted upon. The Currency Office authorities may, if they like, dispense with the indemnity. The object of the bond is to secure the re-payment of the money if it has been wrongly paid. The object of it is not to prevent the payment, but

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to indemnify the Government in case any one else claims the money. We have carefully examined the English cases cited by Counsel for the accused, and we do not think that they have any application to the present case. We think it quite clear that an attempt was made.

Before considering the second question it will be desirable to examine the evidence for the defence. It is unquestionably untrue that the whole notes ever belonged to Umesh Chunder Mitter, or that they ever came into his hands. This is the case both for the prosecution and for the defence. According to the evidence for the defence, it is untrue that the halves ever came from the hands of Haran Chunder Chatterjee into his hands. The defence trace the half notes back. They call in the first place a lady named Din Tarini Dabee, who is said to have had them in her possession.

Almost at the beginning of her examination-in-chief, the Counsel examining this lady plied her with leading questions and other questions of a nature only allowable in cross-examination. There seems to us to have been no excuse whatever for this course, and the result is that, so far as her examination-in-chief is concerned, it is difficult to use it at all as evidence on behalf of the defendant calling her, though it may be used as evidence against him. It is, however, clear from the other evidence that these half notes, which were afterwards sent to the Currency Office, came from this lady. She says that she found them in her box about a year and a half ago, and we do not think that there is any doubt that she gave them to her niece, the wife of the defendant, Hem Chunder Chatterjee.

There is some conflict of testimony between the aunt and the niece as to what took place when the half notes were handed over. The aunt says: "One day we were seated together, and I told my niece that there was some *goolmal* in respect of the numbers of a 20-rupee note. She asked me if I had shown this note to any one. I said yes, I showed it to a person who had called a few days previously to receive money. My niece said if you give the note to me I will show it to my husband. Five or six days later, when my niece came home, she took the note away from me; nothing further took place."

"One day I met her in Calcutta. She spoke to me about this note and asked me whence I got the note. I said I did not remember, but I believed I got it in the course of my money-lending business."

She is then asked in examination-in-chief some questions, most of which are objectionable in form. They are as follows :—

"' Q. What else did your niece say to you or you to her ?

A. Nothing.

Q. Did you want to get money on these pieces of note ?

A. No mention was made about obtaining money.

Q. Did you wish to get the money ?

A. If the note was cashed, and the money paid to me, I would have taken it.

Q. By whom was the note to be cashed ?

A. I gave no direction to my niece as to by whom the note was to be cashed. I made the note over to her that she might show it to her husband.

Q. Why did you want the note to be shown ?

A. Because my niece said 'give it to me and I will show it to my husband.'

Q. But what did you understand by your niece's wanting to show the note to her husband ?

A. I understood that it was taken to be shown to her husband.

Q. For what purpose ?

A. Because he is a man of education, and knows how to read and write. I have a sircar in the house, he can read and write Bengali."

The niece has been called before us and she now says :—

"When she gave me the notes she said 'these notes have been lying with me; I don't know for how long, and I don't know what has become of the other halves of the notes.' She said 'give these notes to your husband, and ask him to change these notes and send me Rs. 40.' "

Of these two statements we have no hesitation in preferring that given by the aunt. The husband of the niece is one of the accused, and she is therefore much interested. The aunt's story was told at the time when the details of the events must have

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been fairly fresh in her memory, and it is pretty clear that her story is substantially accurate.

On getting the notes the niece says that she handed them to her husband saying: "Your aunt-in-law has asked me to hand over to you these two notes; you change them and send her 40 rupees. Her husband addressing Umesh Chunder Mitter, who was then present, said: "I have hardly any leisure to go out of my office. Will you change these notes and send the money to me at my house?" The application seems then to have been made.

It does not appear that the aunt ever said that she had had the corresponding halves in her possession. The niece does not say that she or her husband told Umesh Chunder Mitter that Din Tarini had ever had the whole notes in her possession, or indeed said anything about the whole notes.

In spite of this, Umesh Chunder Mitter, in the letter which he first wrote, said that the other halves were lost from his box where he kept them. This was untrue, as far as he was concerned, and as far as Din Tarini was concerned, it does not appear whether it was true or not. He was apparently aware that he could not recover the money unless he satisfactorily accounted for the loss of the other halves of the notes. It was for this reason that he invented this falsehood.

The inference from this falsehood is that Umesh Chunder Mitter knew that Din Tarini had never had the other halves. If he had known, or learnt of it, there is no real reason why he should not have told the truth. The form D is then sent to Umesh Chunder Mitter, and then occurs an incident which has been much relied upon by the defence. It is said that a letter was written to which the Bengali letter, produced by Hem Chunder, was an answer. The Bengali letter produced appears to have been written in the name of the aunt to her niece in answer to a letter addressed to Din Tarini, and therefore, although the evidence of the sending and of the contents of such letter is of a most suspicious character, we do not think we ought to repudiate such letter, and we accept the story as true.

The witness who speaks to it refers to the contents as follows:—

"The writer of the letter was enquiring in reference to the notes which had been given to her as to how long they were

with the person who sent it, and where he or she got it from. I don't remember anything more than this."

In answer to this letter, the following letter was written at Din Tarini's request to her niece :—

"I have received the particulars of your letter. The note (or notes) about which you wrote to me, that note (or those notes) I received in the course of my money-lending business. Who gave it (or them) I don't know. It has (or they have) been with me for many days, that I know."

After the receipt of this letter D was filled up and sent to the Currency Office. There is nothing in the letter which gives the smallest colour for the false statements in the claim, in the certificate and in the declaration. This is the whole of the evidence. It is noticeable that Din Tarini never claimed to have possessed the other halves, and that no one ever told either Hem Chunder Chatterjee or Umesh Chunder Mitter that she possessed them. On the contrary the falsehood of their statements shows that these persons were aware that Din Tarini never possessed the other halves, and it was necessary for them to tell these untruths in order to account for the other halves.

On this state of facts it was contended that no case has been made out. It was said that, although the false pretence was made out, it was necessary for the prosecution to show that the attempt had been made dishonestly. There is, we think, no doubt that the prosecution must show that the act was done dishonestly. "Dishonestly" is defined in the Penal Code as follows :—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly."

The definitions of "wrongful loss" and "wrongful gain" show that what the prosecution has to prove is that the Government was as against the applicant legally entitled to the 40 rupees, or that the applicant was not entitled. Unquestionably the means used by the applicant were unlawful within the meaning of the Penal Code. If the applicant had any real reason to suppose that he or the person for whom he was acting was legally entitled to the rupees 40, he would not have committed the offence charged. We do not think there can be any doubt that Government is

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entitled to retain the 40 rupees, that is to say is entitled in law to the money until it is claimed by a person who has been the holder of the full notes. They are not obliged to pay the money to the holder of the half notes except as being the person entitled to the whole notes. It was contended that the prosecution should show that somebody, other than Din Tarini, was the owner of the full notes. This argument might possibly apply if "dishonestly" only included "wrongful gain," but it includes in the alternative "wrongful loss." Government being entitled to retain the money, in the absence of proof of ownership of the full notes, the definition of "wrongful loss," and consequently the definition of "dishonestly," is here satisfied. In this case the statement that the applicant owned the whole notes is unqestionably false, and false to his knowledge.

The accused have both borne a good character for some time. If they were to profit at all by the offence—and of this there is some doubt—the profit would have been small as far as these notes were concerned. Both these are circumstances which, in criminal cases, have occasionally great weight, but neither of them can dispose of clear and undisputed facts. So far as the evidence of good character is concerned the false statements seem to us to dissipate at once the effect of that evidence, except so far as the question of punishment is concerned. A man who has to his credit an unblemished character may, of course, claim that it be considered on the question of punishment. It is sad to see men who have by honest work earned the respect of their employers, and of those associated with them, inconsiderately bringing themselves within the grasp of the Criminal law, but the record of many of such cases is to be found in Criminal Courts. We do not think that there is any real distinction between the cases of the two accused. Hem Chunder Chatterjee wrote out the certificate, and there is reason to suppose that he induced Umesh Chunder Mitter to make the application.

There is one more contention with which we must deal: It is argued that we ought not in an appeal lightly to set aside the order of the Magistrate. We agree with this contention. We do not think we ought to interfere unless we are fully satisfied from the evidence that the crime has been proved, and are also

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satisfied that the Magistrate had no reasonable ground for acquitting the prisoners.

Assuming that the reasons which actuated the Magistrate in discharging the prisoners coincide with the arguments which have been addressed to us by Counsel for the respondents, we think that the Magistrate had no reasonable ground for acquitting the prisoners, and that the crime was fully proved. We convict the accused Umesh Chunder Mitter under ss. 420 and 511, Indian Penal Code, and convict Hem Chunder Chatterjee of abetting the offence committed by Umesh Chunder Mitter.

As to sentence, we think that, considering all the circumstances of the case, and especially the good character which the accused have heretofore borne, the ends of justice will be satisfied by the infliction of a fine. We sentence each of the accused to pay a fine of Rs. 200; in default to suffer simple imprisonment for the period of two months.

C. D. P. *Order of acquittal set aside.*

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

ABDUL WAHED AND OTHERS (DECREE-HOLDERS) *v.* FAREEDOONNISSA (JUDGMENT-DEBTOR).*

1889 *March* 1.

Execution of decree—Security for Costs—Security Bond, Enforcement of, by execution—Civil Procedure Code (Act XIV of 1882), *s.* 549—*Act VII of* 1888, *s.* 46—*General Clauses Act (I of* 1868), *s.* 6.

On the 9th June 1888 a decree-holder applied for leave to execute his decree (which was one for costs) against a person who had become security for the costs of an appeal which had been dismissed with costs; this application was refused, on the ground that the law, as it then stood, did not authorize such an application, the remedy of the decree-holder being by regular suit against the surety. Subsequently to the passing of Act VII of 1888 the decree-holder made a fresh application for such execution under s. 46 of that Act. The Court, after referring to s. 6 of the General Clauses Act, rejected the application, on the ground that proceedings against the surety had been commenced before Act VII of 1888 had come into force: *Held*, on appeal, that the application should have been allowed.

* Appeal from Order No. 468 of 1888, against the order of Baboo Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 24th of November 1888.

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ONE Fareedoonnissa Bibee became surety for the costs of a certain person who was an appellant in an appeal pending in the High Court against Abdul Wahed and others at a time previous to the passing of Act VII of 1888. This appeal was dismissed with costs, and Abdul Wahed and his co-respondents in that appeal thereupon sought to recover such costs from Fareedoonnissa, and with that object, on the 9th June 1888, applied for execution of their decree against Fareedoonnissa. This application was dismissed, on the ground that, as the law then stood, the decree-holder's only remedy was to bring a regular suit upon the security bond. On the 1st July 1888, subsequently to this order, which was not appealed against, Act VII of 1888 came into force; and the decree-holders on the 28th July made a fresh application under s. 46 of that Act (which added additional matter to s. 549 of the Civil Procedure Code of 1888) for execution of their decree against Fareedoonnissa. The same Sub-Judge who had dismissed the former application refused to allow the second application, on the ground that Act VII of 1888 did not affect the case, section 6 of the General Clauses Act of 1868 being sufficient to save all proceedings commenced before the amending Act came into operation.

The decree-holders appealed to the High Court.

Moulvi *Mahomed Yusuf* and Baboo *Saligram Singh* for the appellants.

Mr. *R. E. Twidale* for the respondent.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

The question in this appeal is purely one of law, and that law relates, we think, simply to procedure.

We think that the Court below has made a mistake in dealing with that question. The appellants before us were in a former suit respondents in this Court in an appeal from an original decree. In that appeal the appellant was required by this Court to furnish security for costs. The present respondent became surety. That appeal was ultimately dismissed with costs; and the respondents, who are now before us as appellants, seek to recover their costs from the surety. They applied to the lower Court for

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suit. The new provision of Act VII of 1888 is one of procedure, and not one which deals with any right. The right of the decree-holders to recover their money is not affected, nor is the liability of the surety to pay the money. The only alteration is as to the mode in which to recover.

We think, therefore, that the judgment-creditors were entitled to bring this fresh application under the new Act, and the Court below ought to have granted it. That being so, we decree this appeal with costs.

T. A. P. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1889 *January* 24.

BHABA NATH ROY CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* DURGA PROSUNNO GHOSE AND OTHERS (DEFENDANTS).°

Co-sharer—Fractional shareholders in joint undivided estate—Lien on tenure for share of rent—Sale of tenure in satisfaction of decree.

The owner of a fractional share in a joint undivided estate has no lien on the tenure itself for his share of the rent, although such share is collected separately, and, therefore, cannot cause the tenure to be sold in satisfaction of a decree for his share of the rent.

SUIT by fractional shareholders in an undivided zemindari for the sale of a tenure for arrears of rent.

The plaintiffs Prosunno Chunder Roy Chowdhry and six others were the owners of fractional shares in the mouzahs Shibpur and Hosnabad, in the district of the 24-Pergunnahs. Defendants Nos. 2, 3 and 4 had a jama in these mouzahs for which they paid rent to the plaintiffs and their co-sharers. The plaintiffs' share of the rents was paid to them separately. In 1884 the plaintiffs obtained a decree for rent of 1286-1288 (1879-1881) in respect of this jama against defendants Nos. 2, 3 and 4. In execution of this decree the jama was attached, and the 3rd March 1884 was fixed for the sale. Durga Prosunno Ghose, defendant No. 1, thereupon preferred a claim,

° Appeal from Appellate Decree, No. 2337 of 1887, against the decree of H. Beveridge, Esq., Judge of the 24-Pergunnahs, dated the 30th of June 1887, affirming the decree of Baboo Binode Behari Mittra, Munsiff of Bashirhat, dated the 13th September 1886.

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execution of the decree for costs against the surety. On the 9th June last the lower Court rejected their application, holding that, under the law as then laid down by the Civil Procedure Code, the security bond could not be enforced by means of execution of the decree, and that the judgment-creditors must have recourse to a fresh suit against the surety. The judgment-creditors did not appeal against that decision, nor have they brought a fresh suit to recover the amount of the security. In the meantime, on the 1st July 1888, Act VII of 1888 came into force. By s. 46 of that Act, s. 549 of the Code received the following addition: "If such security be furnished, any costs for which a surety may have rendered himself liable may be recovered from him in execution of the decree of the Appellate Court in the same manner as if he were the appellant." The judgment-creditors, taking advantage of this provision of the new Act, made a fresh application on the 28th July for execution against the surety. On the 24th November last this application was likewise rejected by the lower Court. The lower Court referred to s. 6 of the General Clauses Act which enacts: "The repeal of any Statute, Act or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or any proceedings commenced, before the repealing Act shall have come into operation." And the Subordinate Judge goes on to say that "the question whether the decree-holders can enforce the security bond was raised and decided before the amending Act came into operation, and the proceedings against the surety had been commenced before that time."

It seems to us that the lower Court was mistaken in its application of this section of the General Clauses Act. By Act VII of 1888 the previous Statute was not repealed, and we think that the decision of the lower Court of the 9th June decided no more than that the existing law did not permit the decree-holders to recover from the surety in execution of the decree. The amending Act, which came into force a few days afterwards, expressly provides for such recovery from the surety in execution. The lower Court did not, on the 9th June, decide any question of right between the parties. It merely decided that, by the law as it stood then, the decree-holders must have recourse to a separate

alleging that he had purchased the jama at an auction sale, and that he was in possession. His claim was allowed and the property released from attachment on the 14th June 1884.

The plaintiffs thereupon brought this suit for a declaration that the jama was liable for the amount of their decree and that it should be sold in satisfaction of the same.

The plaintiffs alleged that the rent payable to them in respect of the jama had been separately settled with defendants Nos. 2, 3 and 4; that the defendant No. 1 did not purchase the jama; that the jama was not transferable; and that, therefore, even if defendant No. 1 had purchased it, the purchase was invalid; and that, supposing the sale to defendant No. 1 was valid, the jama was liable for the amount of the plaintiffs' decree.

The defendant No. 1 alleged that the jama was a mourasi mokurari ganti, bearing a rental of about Rs. 298, of which the plaintiffs were entitled to Rs. 25-8 a year; that he had purchased the jama at an auction sale on the 6th March 1883, and obtained his sale certificate on the 26th July 1883; and that he was put into possession on the 26th February 1884. He also alleged that the arrears, if any, fell due before he had acquired a right in the property. He contended, *inter alia*, that the plaintiffs, as owners of fractional shares in an undivided zemindari, could not sell the tenure itself in execution of their decree for rent.

The other defendants did not appear.

The Munsiff found that defendant No. 1 had purchased the jama at an auction sale on the 6th March 1883, and that he had been put into possession; that the jama was a mokurari or kayemi jama, and, therefore, transferable by sale. He held that the sale to defendant No. 1 was valid, and that the plaintiffs had failed to prove that defendants Nos. 2, 3 and 4 held the jama under them under a distinct and separate settlement; and that the land of the jama was the *ijmali* land of all the proprietors, although the rent was paid separately to each proprietor or sets of proprietors.

He further held that, in accordance with the provisions of s. 64 of Bengal Act VIII of 1869 and, upon the authority of the case of *Grish Chunder Mitter* v. *Sheik Jakhu* (1) and that

(1) 17 W. R., 352; 12 B. L. R., 488, *note*.

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BHABA NATH ROY CHOWDHRY v. DURGA PROSUNNO GHOSE.

of *Nund Lall Roy* v. *Gooroo Churn Bose* (1), the plaintiffs, as co-sharers in a joint undivided estate, could not cause the tenure itself to be sold in execution of a decree for the share of the rent, but could only sell the right, title and interest of the judgment-debtors under the Code of Civil Procedure; and that, consequently, they could not follow the tenure in the hands of defendant No. 1, in satisfaction of their decree. The Munsiff accordingly dismissed the suit.

The plaintiffs appealed to the District Judge of the 24-Pergunnahs, who upheld the judgment of the Munsiff and dismissed the appeal with costs.

The plaintiffs, with the exception of Prosunno Chunder Roy Chowdhry, preferred a second appeal to the High Court.

Mr. *Woodroffe* and Baboo *Jogesh Chunder Roy* for the appellants.

Mr. *Evans*, Baboo *Jogendra Nath Bose* and Baboo *Kali Charan Banerjee* for the respondents.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was as follows:—

This was a suit to have it declared that a certain tenure was liable to be sold in execution of a decree for arrears of rent, the decree having been obtained against the former owner of the tenure.

It appears that before the decree was passed, the appellant's right and interest had been sold in execution of a money decree, and purchased by the principal defendant in the present suit. The landlord was only a co-sharer. He applied for the sale of the tenure under the provisions s. 64, Bengal Act VIII of 1869, and the procedure governing that application was that laid down in the Code of Civil Procedure. A claim was put in by the purchaser of the tenants' right and interest, who was not registered as transferee in the zemindar's sherishta, under s. 278; and that claim was allowed, and the attachment was withdrawn.

The present suit was brought to establish the decree-holder's right to sell the property in the hands of the alienee. Both the Courts below dismissed the suit. This second appeal was preferred by the plaintiff, and it has been argued on his behalf that the landlord, although only a co-sharer to a certain extent,

(1) 15 W. R., 6.

was entitled to sell the tenure in whosesoever hands it might be, because his rent suit was brought and a decree obtained against the recorded tenant.

It appears to us that the appellant was entitled to alienate his tenure, unless and until it was attached in execution. The case was governed by the ordinary Procedure Code, and, in that Code, there is no bar to alienation of property by the judgment-debtor, so long as that property has not been attached; unless, of course, it was shown that the alienation was intended to defraud creditors. But there is nothing in the procedure, and there is nothing in the decree obtained by the plaintiff giving him any lien upon the land in question, and we are not aware of any statutory lien existing in favour of the plaintiff as a co-sharer. The decree was obtained in May 1883. The purchase by the defendant was in March 1883,—and the sale was confirmed and certificate granted on the 26th July 1883, and the attachment and execution proceedings had not apparently then been commenced.

We find that the property having been attached, the day fixed for sale was 5th March 1884; but, in the meantime, a claim was preferred upon which the property was ultimately released. So far, therefore, as we are aware, the alienation by the original tenant was effected before any execution proceedings were taken by the plaintiff. Had the plaintiff been a sixteen-anna proprietor, there is no doubt that he could, under s. 59 of the then Rent Act, have attached and sold the tenure itself upon the decree obtained against the recorded tenant.

But in the present case it appears to us that his position was different, he being only a fractional co-sharer; and, so far from having any lien upon the land by the Rent Act, he is expressly precluded by s. 64 from proceeding against the tenure, until he has first of all proceeded against all the moveable property of the defaulter. If the plaintiff had no lien upon the tenure in satisfaction of his decree, he cannot succeed in the present suit; and, as I have said, we think that he had no lien either by the decree or by any statute. That being so, we must hold that the decision of the lower Court was correct, and this appeal must be dismissed with costs.

C. D. P. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Norris.

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January 14.

RAM CHUNDER DUTT *v.* DWARKANATH BYSACK AND OTHERS.*

Registrar of High Court, Authority of—Power to execute conveyance and enter into covenants on behalf of infants and persons refusing to execute—Defects of title known to purchaser at time of sale—Covenants for title and quiet enjoyment—Purda-nashin, when not bound by conveyance executed by her containing covenants for title and quiet enjoyment—Civil Procedure Code (Act XIV of 1882), ss. 261, 262—*Rules of Court (Belchambers' Rules and Orders), Nos.* 341 *and* 436.

The Registrar of the High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, if any, but has no authority to bind him by entering into any covenants on his behalf.

The power of the Registrar to execute such a conveyance rests upon statutory authority.

General covenants for title and quiet enjoyment extend to the case of a defect known to the purchaser at the time of the sale, unless the intention of the parties that they should not do so is clearly expressed in the covenants themselves.

"Conveyance," as used in Rule 436 (Belchambers' Rules and Orders), means such an instrument as may be necessary to transfer the estate, if he has any, belonging to the person on behalf of whom the Registrar executes the transfer to the purchaser.

Circumstances under which a *purda-nashin* lady will be relieved from liability under covenants contained in a conveyance executed by her.

D, an heir of one *X*, a deceased Hindu lady, sold and conveyed to *M*, in March 1878, a moiety in certain premises belonging to the estate of *X*. Subsequently a decree was made for partition of the estate left by *X* in a suit to which *D*, *A*, *R*, *G* and *S* were parties, and an order was made in that suit directing the premises, of which *D* had so sold a moiety, to be sold by the Registrar, and the parties were directed to join in the conveyance, the Registrar being directed to approve and execute the same on behalf of *G* who was an infant. At the sale, the plaintiff purchased the premises, and thereafter *D* refused to execute the conveyance, which included the usual covenants for title and quiet enjoyment. A summons was thereupon taken out against him, and an order was made directing the Registrar to execute the conveyance on his behalf. The conveyance was then executed in September 1885 by *A*, *S* and *R*, and by the Registrar on behalf of *D* and the minor

* Original Civil Suit No. 150 of 1888.

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G. In a suit instituted by *M*, under the conveyance of 1878, the Court held that he was entitled to possession, as against the plaintiffs, of the moiety of the premises covered by his conveyance. The plaintiff, therefore, brought a suit against *D*, *A*, *R*, *G* and *S* to recover damages for breach of the covenants for title and quiet enjoyment. It was not found that *R* had any good independent advice in the matter, or that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

Held that, although the Registrar had authority to execute the conveyance on behalf of *D* and *G*, he had no authority to enter into the covenants on their behalf, and that the suit should be dismissed as against them.

Held, also, that having regard to the position of *R*, the suit should also be dismissed as against her.

THIS was a suit to recover damages for breach of covenants for title and for quiet enjoyment, and the circumstances under which it came to be instituted were as follows:—

Anundmoye Dassee, who was the widow of one Joykishen Bysack, died on the 30th of April 1871, leaving a son, Dwarkanath; four grandsons by a son, Gopal Lal Bysack, who had predeceased her, *viz.*, Amrita Lal Bysack, Surendra Lal Bysack, Monohur Lal Bysack, and Girendra Lal Bysack; a grandson, Juggutdoollub Sett, and a grand-daughter, Panna Dassee, children of a daughter, Shamsoondery Dassee, who had also predeceased her.

Anundmoye left a will, dated the 10th of February 1871, of which she appointed Dwarkanath and Amrita Lal executors.

Monohur Lal died unmarried and without issue in July 1876, leaving his mother Rajluckhee Dassee, his heiress.

Probate of Anundmoye's will was granted to Amrita Lal on the 1st of August 1881, and to Dwarkanath on the 13th of August 1881.

Amongst other property possessed by Anundmoye, purchased out of her stridhan and purporting to be disposed of by her will, was a piece of garden land known as No. 22, Machooa Bazar Street, in the town of Calcutta.

On the 28th of March 1878, Dwarkanath sold and conveyed to one Obhoy Churn Mullick a moiety of No. 22, Machooa Bazar Street, for Rs. 3,000.

On the 21st of August 1882, Amrita Lal instituted a suit in the High Court (being suit No. 470 of 1882) against Dwarkanath, charging him with various acts of misfeasance, particularly with

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the fraudulent conveyance of the 28th of March 1878, and asking for an injunction restraining him from interfering with Anundmoye's estate, for the appointment of a receiver, and for the administration of the estate by the Court. Surendra Lal, Girendra Lal, Rajluckhee Dassee, Juggutdoollub Sett and Panna Dassee were made defendants in that suit.

Anundmoye's will directed, *inter alia*, that the balance of the income of the estate, after deducting certain payments and expenses, "should be applied to the expenses of the family; but that if any of her sons and grandsons should become separate in food, the sons and grandsons should divide, take, and enjoy the balance of such income according to the shastras."

The parties seemed to have agreed as to what were their respective rights under the will, and, on the 17th of April 1883, Amrita Lal applied to the Court, on petition, that a decree should be made in the suit declaring that under Anundmoye's will Amrita Lal, Surendra Lal and Girendra Lal, were each entitled to a one-eighth share of her estate absolutely; Rajluckhee Dassee, as the heiress of Monohur Lal, to a one-eighth share for the estate of a Hindu widow; and Dwarkanath to the remaining half; and that certain arbitrators should be appointed to take the accounts and partition the estate.

All the defendants acquiesced in the prayer of that petition, and the Court ordered a reference to the Registrar to enquire and report whether the terms of the proposed settlement were for the benefit of such of the defendants as were infants.

On the 18th of July 1883, the Registrar reported that the terms of the proposed settlement were for the benefit of the infant defendants.

On the 30th of August 1883, on the cause coming on for further directions on the report of the Registrar, a decree was made according to the terms of the petition. The arbitrators made their award on 9th February 1885.

The award directed, *inter alia*, that a sufficient portion of the immoveable property, mentioned in a schedule thereto annexed, should be sold by the Registrar of the Court by public auction for the payment of the debts thereinbefore mentioned and for the costs of the suit.

Amongst the immoveable properties mentioned in the schedule was "a portion" (*i.e.*, Anundmoye's divided portion) "of the premises No. 22, Machooa Bazar Street, containing by estimation 16 cottas 9 chittacks and 35 square feet."

The cause came on for judgment on the award on the 2nd of March 1885, when it was, amongst other things, "ordered and decreed by consent that the divided share of Sreemutty Anundmoye Dassee, deceased, the testatrix in the pleadings mentioned, in the premises No. 22, Machooa Bazar Street, be sold by the Registrar of the Court to the best purchaser that he can get for the same;" and it was further "ordered and decreed with the like consent that all proper parties do join in the conveyance of the said premises, as the said Registrar shall direct, if the parties differ about the same;" and it was further "ordered and decreed with the like consent that the Registrar of this Court do approve of and execute the conveyances of the properties to be sold by him as aforesaid for and on behalf of the infant defendants Surendra Lal Bysack and Girendra Lal Bysack."

The Registrar duly advertised the premises No. 22, Machooa Bazar Street, for sale, and, on the 4th of July 1885, they were sold by him, under certain conditions of sale then produced, and were purchased by the plaintiff for Rs. 7,000.

The sale was confirmed by an order of Court, dated the 17th of July 1885. A draft conveyance of the premises, No. 22, Machooa Bazar Street, was prepared by the plaintiff's attorney and forwarded to Dwarkanath Bysack's attorney, Baboo Moraley Dhur Sen, for approval on his (Dwarkanath's) behalf. On the 5th of August 1885, Baboo Moraley Dhur Sen returned the draft to the plaintiff's attorney "approved as altered."

The proposed parties to the conveyance were Dwarkanath Bysack and Amrita Lal Bysack, as executors of Anundmoye's will of the first part, Dwarkanath, Amrita Lal, Surendra Lal, Girendra Lal, as heirs and legal representatives of Anundmoye, and Rajluckhee Dassee as heiress and legal representative of the estate of Monohur of the second part, and the plaintiff of the third part.

The draft conveyance contained the following covenants: "And the said parties hereto of the first and second parts do and each

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of them doth hereby for themselves himself and herself their his and her heirs executors administrators and assigns covenant declare and agree with the said purchaser " (that is the plaintiff) " his heirs executors administrators and assigns in manner following that is to say that for and notwithstanding any act deed matter or thing by the said parties hereto of the first and second parts or any or either of them or their her and his ancestors made done and performed they the said parties hereto of the first and second parts or some or one of them now have or hath in themselves himself and herself good right full power and lawful and absolute authority to grant release and convey the said piece or parcel of land hereditaments and premises with the appurtenances unto and to the use of the said purchaser his heirs representatives and assigns for ever in manner aforesaid and according to the true intent and meaning of these presents and that it shall and may be lawful for the said purchaser his heirs executors administrators and assigns from time to time and at all times hereafter peaceably and quietly to enter into and have hold occupy possess and enjoy the said piece or parcel of land hereditaments and premises hereby released or intended so to be with their appurtenances and to receive and take the rents issues and profits thereof and every part thereof without any let suit trouble eviction claim or demand whatsoever of or by the said parties hereto of the first and second parts or any person or persons lawfully claiming or to claim by from under or in trust for her him and them and free and clear and freely and clearly discharged and exonerated or otherwise by the said parties hereto of the first and second parts their heirs executors administrators representatives and assigns well and sufficiently saved and kept harmless of from and against all former and other gifts grants bargains uses trusts judgments execution sums of money and all other estates titles troubles charges and incumbrances whatsoever had made executed or knowingly or willingly suffered by the said parties hereto of the first and second parts or any person or persons lawfully claiming or to claim from under or in trust for them."

This covenant was approved by Baboo Moraley Dhur Sen on behalf of Dwarkanath. On the 29th of August 1885, Baboo

Moraley Dhur Sen, on behalf of Dwarkanath, wrote as follows to the plaintiff's attorney :—

"7, CHURCH LANE, CALCUTTA,
29*th August* 1885.

AMRITA LAL BYSACK *v.* DWARKANATH BYSACK.

BABOO PREONATH GHOSE.

DEAR SIR,

I FIND that from an oversight I approved of your client's conveyance of Lot No. 1 on behalf of my client. He cannot execute it, and I fancy you must obtain an order authorising the Registrar to approve of and execute the conveyance on behalf of my client.

Yours faithfully,
MORALEY DHUR SEN."

On the 4th of September 1885, the plaintiff's attorney took out a summons as follows :—

"SUIT No. 470 OF 1882.

In the High Court of Judicature at Fort William in Bengal.
ORDINARY ORIGINAL CIVIL JURISDICTION.
AMRITA LAL BYSACK *v.* DWARKANATH BYSACK.

LET all parties concerned attend before the Sitting Judge in Chambers in the Court-house, on Tuesday, the 8th day of September instant, at the hour of 10 o'clock in the forenoon, on the hearing of an application on the part of Ram Chunder Dutt, the purchaser of the property consisting of Lot No. 1, at a sale held herein by the Registrar of this Honourable Court for an order that the said Registrar do sign and execute the conveyance of the said property, being Lot No. 1, as aforesaid for and in the name of the defendant Dwarkanath Bysack, as one of the executors to the estate of Sreemutty Anundmoye Dassee, deceased, and also as one of her heirs and legal representatives, and that the said defendant, Dwarkanath Bysack, do pay personally the costs of and incidental to this application to be taxed by the taxing officer of this Honourable Court.

Dated this 4th September 1885.

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J. PIGOT.

This summons was taken out by Preonath Ghose, applicant's attorney, against Baboo Moraley Dhur Sen, attorney for the defendant Dwarkanath Bysack.

GROUND—*Affidavit of Ram Chunder Dutt.*"

This summons was duly served on Baboo Moraley Dhur Sen on the 5th and was heard by Pigot, J., on the 8th of September 1885. At the hearing an affidavit of the plaintiff's, containing the following paragraphs, was filed in support:—

"That on the 27th day of July last, my attorney, Baboo Preonath Ghose, sent a draft conveyance of the said Lot No. 1 for the approval of Baboo Moraley Dhur Sen, attorney for the said defendant Dwarkanath Bysack."

"That on the 5th day of August last, my said attorney received a letter from the said Baboo Moraley Dhur Sen, enclosing the said draft conveyance duly approved as altered on behalf of his client, the said defendant Dwarkanath Bysack."

"That since the said 5th day of August last, my said attorney received the said draft conveyance duly approved by the attorneys for the plaintiff, and the said defendants Sreemutty Rajluckhee Dassee and Surendra Lal Bysack, and also by the said Registrar of this Honourable Court on behalf of the said infant defendant, Girendra Lal Bysack."

"That on the 29th day of August last, my said attorney received a letter from the said Baboo Moraley Dhur Sen, a copy of which is as follows:—

[The letter referred to is the one already set out (1)].

Dwarkanath did not appear either in person or by counsel or attorney on the hearing of the summons, and the order asked for therein was made.

On the 10th of September 1885, the conveyance containing the covenants mentioned above was executed by Amrita Lal, as one of the executors of Anundmoye's will, and also as one of her heirs and legal representatives; by Surendra Lal, as an heir and legal representative; by Rajluckhee Dassee, as heiress and legal representative of Monohur; by the Registrar of the Court

(1) *Ante*, p. 335.

on behalf of Girendra Lal, as an heir and legal representative of Anundmoye, in pursuance of the order of the 2nd of March 1885; and by the Registrar of the Court on behalf of Dwarkanath as one of the executors of Anundmoye's will, and also as one of her heirs and legal representatives, in pursuance of the order of the 8th of September 1885.

On the 4th of July 1883, Obhoy Churn Mullick instituted a suit in the High Court (being suit No. 288 of 1883) against Dwarkanath for possession of the premises conveyed to him, (Obhoy Churn) by the Indenture of the 28th of March 1878, and for damages for breach of covenant. Dwarkanath, by his written statement, admitted the Indenture, and alleged that, in consequence of a letter he had furnished to the plaintiff, the tenants on the land had attorned to him and had paid him rent.

Obhoy Churn died intestate on the 24th of November 1883, and by an order of the 22nd of January 1884, the suit was revived in the names of his three sons—Rajendro, Debendro, and Opendro.

The suit came on for hearing on the 14th of August 1884, when it was adjourned for the amendment of the plaint in certain particulars which it is not necessary to mention.

The amendments did not appear to have been made, and on the 4th of June 1885, the suit was dismissed for default of the plaintiff's appearance. On the 26th of June 1885, Obhoy Churn's sons instituted a suit in the High Court (being suit No. 291 of 1885), against Amrita Lal, Surendra Lal, Girendra Lal, Rajluckhee Dassee, Juggutdoollub Sett, Panna Dassee, and Dwarkanath.

The plaint recited the conveyance by Dwarkanath to Obhoy Churn of the 28th of March 1878—the proceedings in the administration suit No. 470 of 1882, the proceedings in Obhoy Churn's suit against Dwarkanath No. 288 of 1883—and alleged that they were in no way bound by the proceedings in the administration suit, and that it was not competent to the defendants to cause the share in No. 22, Machooa Bazar Street, purporting to have been conveyed to Obhoy Churn by the Indenture of the 28th of March 1878 to be sold, and asked for a declaration that they were not so bound, for a stay of the sale, advertised by the Registrar, until the determination of the suit for possession of the said divided half share, and for various other reliefs.

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Notice of motion for an injunction to stay the sale was duly given; the motion was heard on the 2nd of July 1885, and was dismissed with costs.

By an order of the 3rd of August 1885, the plaint was amended by adding the plaintiff in the present suit as a party defendant, and by alleging that he had purchased the premises No. 22, Machooa Bazar Street on the 4th of July 1885, with full knowledge of the plaintiff's claim.

The suit was tried by Trevelyan, J., who dismissed it with costs on the 20th of February 1886.

The learned Judge held that under Anundmoye's will there was a good gift of the premises No. 22, Machooa Bazar Street to the family as it existed at the time of her death, and that Dwarkanath had no authority to sell to Obhoy Churn, who, consequently, took nothing under the conveyance of the 28th of March 1878.

The Mullicks appealed against Trevelyan, J.'s decree, and the Court of Appeal (Petheram, C. J., Wilson and Norris, JJ.) reversed it, holding that the premises did not pass under the will, but that Dwarkanath took them as heir to his mother's stridhan.

The decree directed possession of a divided half share of the premises to be given to the Mullicks, and directed the present plaintiff to pay them certain mesne profits.

The only remaining facts, which it is material to mention, are that the plaintiff was uncle to Rajluckhee Dassee, and had been her manager for some seven or eight years; that on the 21st of August 1882, the date of the plaint in the administration suit No. 470 of 1882, if not before, he became aware of the conveyance of the 28th of March 1878; that he was aware of all the proceedings taken in that suit, and also in Obhoy Churn's suit No. 288 of 1883, and of the application for the injunction; and that at the sale on the 4th of July 1885, he heard Baboo Gonesh Chunder Chunder, the Mullick's attorney, state that his clients claimed a divided half share of the premises No. 22, Machooa Bazar Street.

The plaint in this suit was filed on 21st April 1888.

The defendants were Dwarkanath Bysack, Surendra Lal Bysack, Girendra Lal Bysack, Rajluckhee Dassee and Amrita Lal Bysack; of these only Dwarkanath appeared to contest the suit at the hearing.

Mr. *Bonnerjee* and Mr. *Sale* for the plaintiff.

Mr. *Pugh* and Mr. *O'Kinealy* for the defendant Dwarkanath.

The case was opened by Mr. *Bonnerjee* without any reference to the question as to whether the Registrar had power to bind the defendants on whose behalf he had executed the conveyance, but during the hearing of the evidence, it was stated, in reply to the Court, that the plaintiff relied on s. 261 of the Civil Procedure Code and Rules 341 and 436 of Belchambers' Rules and Orders.

Mr. *Pugh* contended on behalf of Dwarkanath Bysack that the Registrar had no authority under that section or those rules to execute the conveyance on his client's behalf, and that his client was not bound by the covenants.

Mr. *Sale* was heard in reply.

The nature of the arguments appears sufficiently in the judgment of the High Court, but, in addition to the authorities therein referred to, the following were cited:—

By Mr. *Pugh: Ogilvie* v. *Foljambe* (1); Mayne on Damages, pp. 180 and 80.

By Mr. *Sale* (on the question as to Dwarkanath's right to object to the order made on notice to him): *Ex parte Pratt* (2); and to *Smith* v. *Compton* (3); Mayne on Damages, p. 179; and Dart's Vendors and Purchasers, pp. 886 and 894.

The judgment of the Court (NORRIS, J.) was as follows:—

This was a suit to recover damages for breach of covenants for title and for quiet enjoyment. The case is one of some importance, and it is desirable to set out the facts in detail. (His Lordship then proceeded to state the facts as set out above and continued):

For the plaintiff it was contended that all the defendants were liable on the covenants alluded to—Amrita Lal, Surendra Lal, and Rajluckhee—as having themselves executed the conveyance; Dwarkanath and Girendra Lal, as being bound by the execution thereof by the Registrar in their respective names.

(1) 3 Mer. 53. (2) L. R., 12 Q. B. Div., 334.
(3) 3 B. & Ad., 407.

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Mr. Bonnerjee admitted that the Registrar's authority must rest upon statute, or upon practice or procedure having the force of statute.

The statutory authority relied on was s. 261 of the Code of Civil Procedure; the practice or procedure having the force of statute that contained in Rules 341 and 436 of Belchambers' Rules and Orders.

It was further contended for the plaintiff that the "conveyance" referred to in s. 261 of the Code of Civil Procedure, and in Rule 436, meant a deed of transfer containing a warranty, such warranty being expressed by such covenants as were necessary to secure to the grantee the estate granted; that the covenant sued on was such a covenant; and that, therefore, the Registrar had authority so to covenant on behalf of Dwarkanath and Girendra Lal.

Mr. Pugh, on the other hand, contended that the Registrar had no authority, either under s. 261 of the Code of Civil Procedure or under the Rules, to execute the conveyance on his client's behalf.

As regard s. 261, he contended that it applied only to cases where a decree had been made for specific performance; he denied that in this case there had been any "decree for the execution of a conveyance;" he denied that his client was a "judgment-debtor" within the meaning of the section, or that the plaintiff was a "decree-holder:" he further contended that if s. 261 was applicable, and if the plaintiff was a "decree-holder" and the defendant a "judgment-debtor" within the meaning of the section, yet the Registrar had no authority to act under the provisions of the section, because the procedure laid down by the section had not been followed.

As regards Rule 436, Mr. Pugh contended that it had no statutory authority, and that even if it had, and was applicable to the case, yet, as the procedure there laid down had not been complied with, the Registrar had no authority to execute the conveyance on his client's behalf.

Mr. Pugh further argued that even if, under the provisions of s. 261 and Rule 436, or either of them, the Registrar had authority to execute the conveyance on Dwarkanath's behalf,

he had only authority to execute such a conveyance as might be necessary to pass Dwarkanath's estate, and could not possibly have any authority to enter into covenants on his behalf.

And, lastly, Mr. Pugh contended that general covenants for title and quiet enjoyment did not embrace the case of a defect of title known to the purchaser before or at the date of his purchase.

I think I have correctly stated the views expressed by the respective learned Counsel.

Mr. Pugh's arguments upon s. 261 and Rule 426 are applicable to the case as against Girendra Lal as well as to that against his own client; his argument upon the question of a known defect at the date of the purchase is applicable to all of the defendants. I propose to deal in the first place with the argument common to all the defendants.

In support of it, Mr. Pugh referred to Coke on Littleton, 384A, the last page in the note; Platt on Covenants, 387; Sugden's Vendors and Purchasers, 14th Ed., 368; and, *Gas Light and Coke Company* v. *Towse* (1).

The passage from Platt runs as follows: "Where the title is known to be defective, the party will sometimes complete his purchase, relying on the vendor's covenants for indemnity. It must, of course, under these circumstances, be matter of express agreement, whether the vendee will take the conveyance containing covenants, with the usual qualification, or whether the covenants shall be made to extend generally to the acts of all the world. Should the seller agree to covenant against this defect specially and particularly, prudence suggests, with a view to keep the fact of unsoundness of title from the face of the purchase deed, that the indemnity should be contained in a separate instrument. Even in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice."

This is, I think, a meagre authority for Mr. Pugh's contention. The case of the *Gas Light and Coke Company* v. *Towse* (1) does not in my opinion assist him.

(1) L. R., 35 Ch. Div., 519.

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On the other hand in the last edition of Dart's Vendors and Purchasers, at page 886, it is said: "Although the fact of the purchaser having notice of a defect cannot prevent the covenants for title from extending to it, since extrinsic evidence of intention is inadmissible for the purpose of construing a deed; yet, in an action to rectify the covenant, that fact may be used as the basis of an inference, that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware. It has accordingly been suggested that, if the purchaser consents to take a defective title, in reliance on the covenant for title, so that the covenant is intended to cover a known defect, this intention should be clearly expressed in the covenant itself." And in the foot-note it is said: "It may be observed that none of the authorities warrant the proposition that it is doubtful whether the covenant would extend to a known defect."

This is, I think, a correct view of the law, and I must, therefore, hold that the covenant extends to the defect in title in consequence of which the plaintiff, though well aware of it, was dispossessed of a moiety of the premises he had purchased.

I now proceed to deal with the case as against Girendra Lal. He is a minor, and no guardian *ad litem* has been appointed, and upon this ground alone I think the suit against him should be dismissed.

But there is also another ground. For reasons which I shall presently explain, I am of opinion that the Registrar had authority to execute the conveyance on Girendra Lal's behalf; but I am clearly of opinion that he had no authority to covenant on his behalf. If authority is wanted for this proposition, it will be found in the case of *Waghela Rajsanji* v. *Shekh Masludin* (1), for a reference to which I am indebted to Mr. Pugh. In that case a guardian covenanted on behalf of her infant ward to indemnify the purchaser of the ward's estate against any claim by the Government for revenue; the Judicial Committee held that it was beyond the power of the guardian to impose a personal liability on the ward.

(1) L. R., 14 I. A., 89.

The Registrar, in a case such as this, cannot be in a higher position than the guardian of an infant ward.

It is but right to say that the learned Counsel for the plaintiff, after argument, acquiesced in this view.

I have had considerable doubt as to whether there should not be a decree against Rajluckhee; but, upon consideration, I am of opinion that the suit as against her should be dismissed.

Rajluckhee is a *purda-nashin* lady. The only legal advice she had before she executed the conveyance was from Baboo Preo Nath Bose, the attorney of the plaintiff (who, as I have already said, is her uncle, and was for many years her manager). The evidence as to the explanation of the deed to Rajluckhee is that of her son Surendra Lal, who said: "Preo Nath Bose explained the deed to my mother."

I do not think this is sufficient. Before I can hold a *purda-nashin* lady liable upon a covenant of such unusual stringency as the covenant now sued on, I must be satisfied that she had "good independent advice in the matter," and that she clearly understood the nature of the contract she was entering into, and the liabilities she was taking upon herself.

I now come to the case against Dwarkanath. It appears that Rule 436 is based upon Statutory Enactment.

Act XXV of 1841—"An Act for amending the law concerning imprisonment for contempts of decrees or orders made by Courts of Equity"—an Act containing provisions similar to those to be found in 11 Geo. IV and 1 Wm. IV, c. 36, provided that when any person should have been directed by any decree or order in Equity of Her Majesty's Supreme Courts to execute any deed, and should have refused or neglected so to do, and had been detained in prison for two months for contempt, the Court might appoint the Master or Registrar to execute the deed.

Act V of 1855—"An Act to assimilate the process of execution on all sides of Her Majesty's Supreme Courts, and to extend and amend the provisions of Act XXV of 1841"—provided that "whenever any person has been directed by any judgment, decree, sentence, or order of any of the said Courts to execute any conveyance, and such person has refused or neglected to obey such direction, or has evaded compliance therewith either by absenting

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himself in order to avoid service of the judgment, decree, sentence or order wherein such direction is contained, or by any other means, it shall be lawful for the Court by which such direction has been given, whether the person disobeying or evading compliance with such direction is in custody or not, upon application made to the said Court for that purpose, and upon proof to its satisfaction of such default or evasion as aforesaid, to order or appoint the Registrar, Master, or other officer of the said Court to execute such conveyance."

Act XXV of 1841, in so far as it had not been repealed, and Act V of 1855, except as to the Straits Settlement, were repealed by Act VIII of 1868; but the repealing Act contained the following saving clause: "Nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised, or derived by, in, or from any enactment hereby repealed."

Act VIII of 1868 was repealed by Act XIV of 1870; Act XIV of 1870 by Act XII of 1873; Act XII of 1873 by Act XVI of 1874; and Act XVI of 1874 by Act XII of 1876; but all these Acts contain the same saving clause as is contained in Act VIII of 1868. The procedure laid down by Act V of 1855 is, therefore, still in force, and is defined in Rule 436 of Belchambers' Rules and Orders.

I am, therefore, of opinion that the order of the 8th of September 1885 was properly made, save as hereinafter mentioned, and that the Registrar had authority to execute the conveyance on behalf of Dwarkanath.

This leads me to the consideration of Mr. Pugh's objection that the form of procedure laid down in Rule 436 was not followed.

Rule 436 runs as follows: "If any person, certified by the Registrar to be a necessary party to a conveyance, be a minor, or otherwise under disability, or, being *sui juris*, shall neglect or refuse to execute the conveyance, an order may be obtained in the case of a person under disability, directing the Registrar to

execute the conveyance for him and in his name, and in other cases, directing the person to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name. The application shall be on summons, and shall be supported by an affidavit or affirmation of the facts, and it shall be shown that the person required to execute the conveyance was certified by the Registrar to be a necessary party, and that the conveyance has been approved of by such party or by the Registrar. Unless otherwise ordered, the costs of such application, in the case of a person under disability, shall be part of the costs of the sale, and, in other cases, shall be borne and paid by the defaulting party."

The order of the 8th of September 1885 was not "an order directing" Dwarkanath "to execute the conveyance within a time to be fixed by the order, and, in default thereof, directing the Registrar to execute the same for him and in his name;" it was an order directing "the Registrar of the Court to approve of, and execute for, and in the name of the said defendant Dwarkanath Bysack, as one of the executors of the estate of Sreemutty Anundmoye Dassee, deceased, and also as one of her heirs and legal representatives, the conveyance of the said house and premises No. 22, Machooa Bazar Street;" nor is there any evidence of the service of the order on Dwarkanath. Mr. Pugh argued that the making of the order in the words of the rule, its service upon the defendant, or his default to obey it, were conditions precedent to the authority of the Registrar to execute the conveyance.

On the other side it was contended that, if these were conditions precedent, which was not admitted, the defendant had waived their performance by his attorney's letter of the 29th August 1885.

I think that the plaintiff's contention must prevail.

I am, therefore, of opinion that the Registrar had authority to execute the conveyance on behalf of Dwarkanath. The next point to be considered is—Had the Registrar authority to covenant on behalf of Dwarkanath?

I am of opinion that he had no such authority. Mr. Sale puts his client's case thus—"The defendant was bound to give a conveyance with the usual covenants. The covenant sued

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upon is a usual one; and the effect of the order upon the Registrar was to direct him to do what the defendant was bound to do."

No doubt where there is a contract for the sale of immoveable property, an agreement to make a good title is implied.

The Legislature of this country has distinctly recognized this principle in the Transfer of Property Act.

But in this case there was no agreement for sale, and I am unable to construe "conveyance" in Rule 436 as meaning "conveyance executed by virtue of an agreement for sale."

I think "conveyance" in Rule 436 means such an instrument as may be necessary to transfer *A's* estate, if he has any, to *B*.

In the result then, I am of opinion that the suit must be dismissed as against Dwarkanath with costs.

There must be a decree against Amrita Lal and Surendra Lal for Rs. 4,900. I arrive at this sum in this way: the plaintiff gave Rs. 7,000 for the premises, he sold the portion of which he was not dispossessed for Rs. 3,785, the difference between these two sums is Rs. 3,215; I add to this Rs. 1,188 paid to Baboo Preo Nath Bose for costs in the suit brought by the Mullicks, Rs. 70 paid to Baboo Gonesh Chunder, and Rs 437 interest on Rs. 3,215 at 6 per cent. from the 24th of September 1886, the date of dispossession to this date. The Rs. 4,900 plus the costs on scale No 1 will carry interest at 6 per cent. from date of decree until realization.

Suit decreed in part.

Attorney for the plaintiff: Baboo *D. N. Dutt.*

Attorney for the defendant Dwarkanath Bysack: Baboo *N. C. Bose.*

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

UMASOONDURY DASSY (JUDGMENT-DEBTOR) *v.* BROJONATH BHUTTACHARJEE, MANAGER OF THE ESTATE OF BARODA PROSAD CHOWDHRY (DECREE-HOLDER).* 1889 *February* 14.

Execution of Decree—Transfer by operation of law—Civil Procedure Code (Act XIV of 1882), *s.* 232—*Right of Procedure—Execution under Bengal Act VIII of* 1869 *and Act VIII of* 1885.

Upon the death of the full owner, the mother took out probate of a will in which she was appointed executrix. The will was afterwards disputed by the minor son of the testator, and probate was revoked: but, while the mother was in possession of the estate as executrix, she sued and obtained a decree for rent under Bengal Act VIII of 1869.

Upon the application of the minor for the execution of the decree: *Held*, that the minor was in a position to execute the decree, his succession to the estate of his father being a succession or *transfer by operation of law* within the meaning of s. 232 of the Code of Civil Procedure.

Held, also, that the mode in which the decree was executed under the old Rent Act, Bengal Act VIII of 1869, was, in so far as it was a right at all that belonged to the judgment-creditor, not a private right, but a mere right of procedure, and the execution was therefore to be governed by Act VIII of 1885.

ON the death of one Horo Prosad Roy Chowdhry, his mother, Radhicaranee Chowdhranee, set up a will appointing her executrix of the properties left by him, and obtained probate thereof from the Court of the District Judge of the 24-Pergunnahs. Subsequently the will was disputed on behalf of Baroda Prosad Chowdhry, the minor son of Horo Prosad, and, on the 22nd December 1886, the High Court revoked probate thereof.

On the 8th November 1887, Brojonath Bhuttacharjee was appointed Manager of the Estate of the minor Baroda Prosad by the Court of Wards.

While she was in possession of the estate as executrix, Radhicaranee Chowdhranee obtained a decree for rent under

* Appeal from Order No. 462 of 1888, against the order of Baboo Radha Krishna Sein, Subordinate Judge of the 24-Pergunnahs, dated the 19th of September 1888.

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Bengal Act VIII of 1869 against Umasoondury Dassy and others. This decree seems to have been confirmed by the High Court on the 22nd July 1885. On the 17th September 1887, Brojonath Bhuttacharjee applied to the Second Subordinate Judge of the 24-Pergunnahs for the execution of this decree. Two objections were raised to the application on behalf of the judgment-debtors. It was objected, in the *first* place, that the decree did not vest in the minor Baroda Prosad; and, *secondly*, that as the decree was made when Bengal Act VIII of 1869 was in force, execution must be governed by that Act and not by the new Rent Act of 1885. The Subordinate Judge held that under s. 232 of the Civil Procedure Code, the decree had vested in the minor, and that Brojonath Bhuttacharjee, as Manager, could execute it. He also held that execution of the decree was governed by the new Rent Act of 1885. Accordingly the Subordinate Judge made an order for execution.

From this order the judgment-debtor, Umasoondury Dassy, appealed to the High Court.

Baboo *Nil Madhub Bose* and Baboo *Mohini Mohun Chuckerbutty* for the appellant.

Baboo *Dwarka Nath Chuckerbutty* for the respondent.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

In this appeal two points have been raised and discussed at some length. It appears that, after the death of the full owner of the property, the mother took out probate of a will in which she was appointed executrix; that, no doubt, vested the property in her. Afterwards probate was revoked; and that, no doubt, took the estate out of her, and then the estate went to the minor heir. While she had the estate she sued and obtained a decree; and the minor now seeks to have that decree executed.

Against the execution two objections have been raised. *First*, that the minor can have no interest under the decree. The answer to that, we think, is that the lower Court was correct in holding that he had an interest. Section 232 of the Code of Civil Procedure says: "If a decree be transferred by assignment

in writing or by operation of law from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it." We think that when the minor succeeds to the estate—which, up to the date it fell into his hands, had been in possession of the executrix—that there was a succession or transfer by operation of law within that section. We therefore think that the minor is in a position to execute the decree.

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The next point is that the execution must be governed by Bengal Act VIII of 1869, and not by the present Rent Act, and that raises the question whether the mode, in which the decree was executed under the old Rent Act, was, in so far as it was a right at all that belonged to the judgment-creditor, a private right or a mere right of procedure. It is not contested that if it be a right of procedure and nothing more, the new Act applies. The old law is to be found in ss. 59, 60 and 61 of Bengal Act VIII of 1869. Section 59 lays down the procedure to be followed on sale of an under-tenure, and s. 61 closes that portion of it by stating when and when not the order of sale shall issue.

We think the right contended for by the appellant in this case, even if it existed, which we do not decide, was a mere right of procedure, and that the Judge in the Court below was right in holding that the present execution proceedings must be governed by the procedure now in force.

The result is that the appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

THE EMPRESS *v.* BAIKANTA BAURI.[o]

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False Evidence—Alternative Charges—Statement made to Police Officer investigating case—Penal Code (Act XLV of 1860), ss., 191, 193—Criminal Procedure Code (Act X of 1882) s. 161.

An accused was charged with giving false evidence upon an alternative charge, one statement having been made to a police officer investigating a case of arson, and the other having been made when he was examined as a

[o] Criminal Reference No. 2 of 1889, made by R. F. Rampini, Esq., Sessions Judge of Burdwan, dated the 26th of January 1889.

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witness before the Joint Magistrate when the case was being inquired into. The two statements were contradictory, and no evidence was given to show which of them was false. It was not proved that the statement made to the police officer was made in answer to questions put by him, and the only evidence given at the trial with regard to the inquiry upon which the police officer was engaged, was to the effect that an inquiry was being made about the burning of a house. The jury acquitted the accused, and the case was referred to the High Court by the Sessions Judge who disagreed with the verdict of acquittal : *Held*, that the verdict was right.

Before a conviction in such a case can be sustained, it must, having regard to the provisions of s. 161 of the Criminal Procedure Code, be clearly proved by the evidence that the statement made to the police officer was a statement in answer to questions put to the accused by the investigating police officer, and in the absence of such evidence, even though the statement were proved to be false, a conviction could not be sustained.

Held, further, that in such a case it is also necessary for the prosecution to establish that the police constable was making an investigation under Chapter XIV of the Criminal Procedure Code.

THIS was a reference made by the Sessions Judge of Burdwan under the following circumstances:—

On the 24th November 1888, in the course of a trial before the Joint Magistrate of Ranigunge, in which one Rambandhu Ghose and others were charged with mischievously destroying a house by fire, the accused in this case, Baikanta Bauri, and two other persons, named Dinonath Ojha and Kalpa Bauri, gave evidence, during the course of which they stated that they had not seen the house set fire to. The Sessions Judge, in his letter referring the case, stated that these three witnesses had previously stated to a head constable of police, who had inquired into the case against Rambandhu Ghose and the others charged with him, that they had seen the house set fire to and had given full details of the occurrence which they said they had witnessed.

The Joint Magistrate, having regard to the provisions of s. 161 of the Criminal Procedure Code under which all persons are bound to answer truly all questions put to them by a police officer relating to a case into which he is inquiring, being of opinion that the three witnesses had given false evidence either before the police officer or before him, committed them separately to the Court of the Sessions Judge to be tried on alternative charges of giving false evidence.

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Three separate trials were held by the Sessions Judge with the aid of the same jury, which resulted in the jury acquitting Baikanta Bauri and convicting the other two. The Sessions Judge disagreed with the verdict of acquittal, and referred this case to the High Court, giving his reasons for so doing in his letter of reference as follows:

"I tried the case of Dinonath Ojha on the 24th instant, with the assistance of a jury, and the jury unanimously found the accused guilty of the offence with which he was charged. I proceeded, on the 25th instant, to try the case of Baikanta Bauri with the assistance of the same jury, and though the circumstances of his case were similar to those of Dinonath Ojha, and though the evidence in the two cases were exactly the same, except that in Baikanta Bauri's case one additional witness was examined by the prosecution, and no witness was cited for the defence, whereas one witness was cited on behalf of Dinonath Ojha, the jury acquitted the accused. I at first thought that the jury acquitted Baikanta Bauri, because I had sentenced Dinonath Ojha to six months' rigorous imprisonment, and it occurred to me that this punishment may have seemed to them to be excessive. But on my proceeding, later in the day, to try, with the assistance of the same jury, the case of the third accused person, namely, Kalpa Bauri, they unanimously convicted this man, though the evidence for the prosecution was the same as the evidence for the prosecution in the case of Baikanta Bauri, with the exception that there was one witness for the prosecution less.

"I can see no distinction between the cases of these three accused persons, two of whom the jury have found guilty and one of whom the jury have acquitted. I approve of the unanimous verdict of the jury in the cases of Dinonath Ojha and Kalpa Bauri, and entirely disagree with the verdict of the jury in the case of Baikanta Bauri. I can see no reason for it whatever, and consider it to be illogical and whimsical in the extreme. I submit the records of all three cases for the inspection of the High Court and recommend that the verdict of the jury in the case of Baikanta Bauri be set aside, and that like

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Dinonath Ojha and Kalpa Bauri, he be convicted of an offence under s. 193, Penal Code."

No one appeared on the reference.

The charge framed against the accused together with the nature of the evidence admitted during the trial before the Sessions Judge, and the charge of the Sessions Judge to the jury, appear sufficiently from the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows:—

The Sessions Judge of Burdwan, dissenting from the verdict of acquittal of the jury, has referred this case under s. 307 of the Code of Criminal Procedure. The charge against the accused was under s. 193 of the Indian Penal Code, of giving false evidence, and is to the following effect: "That he, on or about the 31st day of October 1888, at Purulia, Thannah Ranigunge, in the course of the inquiry into the case of arson of *Empress* v. *Rambandhu Ghose* and others, before Anadinath Bundopadhya, head constable of outpost Faridpore, stated in evidence that he had seen Rambandhu Ghose set fire to the house, and that he, on or about the 23rd day of November 1888, at Bharra, Thannah Assensole, in the course of the inquiry into the case of arson—*Empress* v. *Rambandhu Ghose and others*—before the Sub-Divisional Magistrate of Ranigunge, stated in evidence: "I did not see anybody set fire to the house. I was a mile off at home," one of which statements he either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of the Court of Sessions."

The evidence that was given in this case does not show which of these statements is false, but the Sessions Judge is of opinion that the two statements are contradictory, that one of them must be false, and therefore that the accused should be found guilty under s. 193 of the Indian Penal Code. Now the statement made by the accused on the 31st day of October 1888 was made before one Anadinath Bundopadhya, head constable of an outpost called Faridpore. It appears to us that the Sessions Judge, in his charge to the jury, has not at all referred to the question whether, if this statement be false, the accused would be guilty of giving false evidence under s. 193. In his charge to the

jury he says: "The jury had therefore to consider (1) whether he had made such a statement before the head constable; (2) whether he had made such a statement before the Joint Magistrate; and (3) whether the two statements were so, contradictory as that one or other of them must be false, and both could not be true." Then, in another part of his charge, he says: "I then said on this evidence the jury must make up their minds on the three points previously alluded to. If they believed the witnesses and thought the two statements said to have been made by the accused were directly contradictory, so that both could not be true, the jury would be justified in convicting him under s. 193." It seems to us that the Sessions Judge has overlooked a very important point in the case, *viz.*, accepting that the statement made before the head constable was untrue, whether the accused could be found guilty of giving false evidence under s. 193. Section 193 says: "Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." Now it is evident that the statement before the head constable, if it at all comes within the section, must fall within the last part of it, *viz.*, "whoever intentionally gives or fabricates false evidence *in any other case*, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine." Section 191 of the Indian Penal Code says: "Whoever, being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence." Now the question is whether in this case the statement before the head constable was such as would bring it within the definition of false evidence

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given in s. 191 of the Indian Penal Code. The answer to this question will depend upon the construction we put upon s. 161 of the Code of Criminal Procedure. The second paragraph of that section declares that a person examined by a police officer under the provisions of it "shall be bound to answer truly all questions relating to such case put to him by such officer." Before an accused person can be held guilty under s. 193, it is, therefore, necessary that it should be shown by the evidence that the statement which is set out in the charge was a statement in answer to questions put by the investigating police officer to the accused. That this statement was made in answer to any question put by the investigating police officer is not established by any evidence. The head constable before whom this statement was made only says: "I examined the accused Baikanta Bauri as a witness in that case. He came to the outpost with the complainant. I examined him on the 31st October. I wrote down what he said. I wrote down exactly what he said. I produce the record of his statement, exhibit C." But he does not say that this statement, *viz.*, exhibit C, was in answer to any questions put by him to the accused. There is no other witness to establish that fact. That being so we cannot say that the statement in question is covered by paragraph 2 of s. 161 of the Code of Criminal Procedure. It is true that the record of the statement is headed: "On being questioned said;" but that would be no evidence of the fact that the accused was questioned and in answer to a question the statement was made, until that fact was proved by oral evidence. The statement in question is therefore one which upon the evidence we find was made by the accused to the head constable, Anadinath Bundopadhya. Upon the establishment of this fact alone, without any proof that the statement was in answer to questions put by the head constable, we are of opinion that the accused cannot be convicted of giving false evidence under s. 193 even if that statement be proved to be false. This is the main ground upon which we think that the verdict of acquittal is correct, but we desire also to point out that the evidence in this case is very meagre upon another point which it was necessary for the prosecution to establish, *viz.*, that the aforesaid head constable, Anadinath Bundopadhya, was making,

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an investigation under Chapter XIV of the Criminal Procedure Code. The charge, set out above, states that this statement before the head constable was made in the course of an inquiry in a case of arson of *The Empress* v. *Rambandhu Ghose and others*. A case of arson is certainly a cognizable case; but that Anadinath Bundopadhya was making an inquiry under Chapter XIV, when the statement in question was made, and that the case in which that inquiry was being made was a case of arson, is not at all clearly established by the evidence recorded in the case. All that the witnesses who speak upon that point say, is that an inquiry was being made in the case of *Buloram Roy* v. *Rambandhu Ghose* about the burning of a house. This evidence is not in our opinion sufficient to show that the inquiry was being made into a cognizable case, *viz*, arson. We are, therefore, of opinion that the verdict of the jury was right. We therefore acquit the accused of the charge framed against him and direct his release from custody.

H. T. H. *Acquittal upheld.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

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January 14.

GOUR SUNDAR LAHIRI (DEFENDANT) *v.* HEM CHUNDER CHOWDHURY (PLAINTIFF).

GOUR SUNDAR LAHIRI (DEFENDANT) *v.* HAFIZ MAHOMED ALI KHAN (PLAINTIFF).*

Civil Procedure Code, 1882, *s.* 244—*Representative of judgment-debtor—Purchaser at execution sale—Private Purchase—Limitation Act*, 1877, *Art.* 179—*Application not in accordance with law—Application for execution by Benamidar—Purchase* pendente lite.

The defendants Nos. 2, 3 and 4 were, together with one *M*, the owners of certain immoveable property, including two mehals, Olipore and Ekdhala, subject to a mortgage, on which the mortgagee obtained a decree on 30th July 1875. Whilst that suit was pending one *K D* took out execution of a money decree which he had obtained in 1871, against defendant No. 3, and put up for sale the mehal Olipore which was purchased by the father

* Appeals from Original Decrees, Nos. 103 and 104 of 1887, against the decrees of Baboo Hemango Chunder Rose, Subordinate Judge of Mymensingh, dated the 26th of February 1887.

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of the plaintiff *A*, who eventually obtained possession of it through the Court. The plaintiff *B* purchased privately the mehal Ekdhala from the mortgagors and from *M*, some time after the date of the decree on the mortgage. That decree was in course of execution when the mortgagee died and his estate came into the hands of the Administrator-General, who, on 13th August 1878, sold the decree to *G*, defendant No. 1. After this sale several applications were made to have the name of *G* substituted for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of *G*, until 18th July 1885, when, after notice to the defendants under s. 232 of the Civil Procedure Code, *G's* name was substituted as decree-holder, and execution was taken out against the mortgaged property including Olipore and Ekdhala. The plaintiffs each claimed the mehal they had respectively purchased, but their claims were disallowed.

In suits brought by the plaintiffs for a declaration of their right to hold the properties free of the mortgage, the Court found that *G* was only a *benamidar* so far as his purchase of the mortgage decree was concerned. *Held*, the plaintiff *A*, being the purchaser at a public sale in execution of a decree, was not the representative of the judgment-debtors, the mortgagors, within the meaning of s. 244 of the Civil Procedure Code; but the case was different with respect to plaintiff *B*, who claimed by private purchase, and must be considered the representative of the judgment-debtors within the meaning of that section.

Dinendronath Sannyal v. *Raj Coomar Ghose* (1), *Anundmoyee Dossee* v. *Dhonendro Chunder Mookerjee* (2), and *Lalla Prabhulal* v. *Mylne* (3), referred to.

Held, also, that *G* being merely a *benamidar*, the applications made by him for execution of the decree and for substitution of his name as decree-holder under s. 232 of the Civil Procedure Code, were not applications made in accordance with law, within the terms of Art. 179 of the Limitation Act, 1877, so as to prevent the operation of the law of limitation. Execution of the mortgage decree was, therefore, barred.

Abdul Kureem v. *Chukhun* (4), *Denonath Chuckerbutty* v. *Lallit Coomar Gangapadhya* (5), and *Mis. Ap.* 453 *of* 1885 (6) followed.

Purna Chandra Roy v. *Abhaya Chundra Roy* (7) and *Nadir Hossein* v. *Pearoo Thovildarinee* (8) dissented from.

The mortgage decree having become inoperative, the plaintiff *A*, though a purchaser *pendente lite*, was no longer bound by it, and the defendant therefore was not entitled to enforce the mortgage as against him.

(1) L. R. 8 I. A., 65; I. L. R., 7 Calc., 107.
(2) 14 Moore's I. A., 101; 8 B. L. R., 122.
(3) I. L. R., 14 Calc., 401.
(4) 5 C. L. R., 253.
(5) I. L. R., 9 Calc., 633; 12 C. L. R., 145.
(6) Unreported.
(7) 4 B. L. R., App. 40.
(8) 14 B. L. R., 425.

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Appeal 103.—In this case Hem Chunder Chowdhry, the plaintiff, claimed through Kali Chunder Chowdhry, the purchaser at a sale in execution of a decree against Kashi Chunder Bhaduri, defendant No. 3. The defendants Nos. 2 and 3, Juggut Chunder Bhaduri and Kashi Chunder Bhaduri, were brothers, and together with another brother, Mohesh Chunder Bhaduri, not a party to the suit, and defendant No. 4, the widow of another brother, formed a joint family, and Mohesh Chunder acted as their ammooktear or general agent. The Bhaduris owned, among other landed properties, two mehals, called, respectively, Olipore and Ekdhala. On the 25th September 1871, one Kripamoyee Debia obtained a money decree against Kashi Chunder Bhaduri, defendant No. 3, in execution of which the mehal Olipore was put up for sale on the 21st June 1875, and purchased for Rs. 10,000, by Kali Chunder Chowdhry, the father of the plaintiff, who, on 26th September 1877, obtained possession of the property through the Court.

This purchase was made in the course of a suit in which, on the 30th July 1875, one Manson obtained a decree against the Bhaduris on a mortgage which included the mehals Olipore and Ekdhala. This mortgage decree was in course of execution when Manson died and his estate came into the hands of the Administrator-General, who, on 13th August 1878 (corresponding to the 29th Srabun 1285), sold the decree to Gour Sundar Lahiri, defendant No. 1, who was the brother-in-law of the defendants Nos. 2 to 4 and of Mohesh Chunder Bhaduri. After this sale several applications were made to execute the decree and for substitution of the name of the assignee, Gour Sundar Lahiri, for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree, or any order made for substitution of the name of the assignee, until 18th July 1885, when, after notice to the judgment-debtor under s. 232 of the Civil Procedure Code, that substitution was made, and execution was taken out against the mortgaged property including the mehal Olipore. The plaintiff claimed that mehal, but his claim was disallowed, and the property ordered to be sold. The plaintiff, therefore, brought this suit to have declared his right to hold that property free of the mortgage.

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Appeal 104.—In this case, besides the above facts, it is only necessary to state that the suit related to the mehal Ekdhala which had been purchased by the plaintiff, Hafiz Mahomed Ali Khan, by private sale, from the Bhaduri defendants, and from Mohesh Chunder Bhaduri, under deeds of sale dated 24th Falgoon 1284 (7th March 1878), and 5th Joisto 1285 (18th May 1878). This property had also been attached by Gour Sundar Lahiri under the mortgage decree, and the suit was brought after rejection of the plaintiffs' claim to that property, to have it declared that it was not liable to sale under that decree.

The issues raised, so far as they are material to this report, were to the following effect: Whether or not the suits will lie; whether or not, the mortgage decree sought to be executed was barred by limitation; whether or not the plaintiff in appeal 103 purchased with notice of the mortgage; whether or not the purchase of the mortgage decree by the defendant No. 1 was *benami* for defendants Nos. 2 to 4 and collusive; and whether or not that decree bound the plaintiffs.

The Subordinate Judge gave the plaintiff a decree in each suit.

The defendant appealed to the High Court.

Mr. *H. Bell*, Mr. *B. Chuckerbutty* and Baboo *Grija Sunkur Mozumdar* for the appellant.

Mr. *Evans*, Baboo *Srinath Das* and Baboo *Jogesh Chunder Roy* for the respondents.

The cases cited and arguments appear sufficiently in the judgment of the Court (PRINSEP and GHOSE, JJ.) which was as follows:—

These two cases were tried together by the lower Court and also by us in appeal by consent of parties, because in some respects the same facts arise in both of them. In both cases the plaintiffs, as purchasers from mortgagors, seek to avoid the effect of the same mortgage decree as affecting their properties. The plaintiffs in each case hold separate properties; but the main points raised in the cases and the circumstances upon which their titles depend are in some respects similar. The mortgage decree was obtained on the 30th July 1875 by one Manson. While that suit was

pending and before the decree was delivered, the share of one of the three mortgagors in a portion of the mortgaged property was attached in execution of a money decree, and on the 21st July 1875, was, in execution of that decree, sold to Kali Chunder Chowdhry, the father of the plaintiff in appeal No. 103. Possession was given to that purchaser, on the 26th September 1877, through the Court. The plaintiff, in the other case, bought privately some of the mortgaged properties from the three mortgagors and also from Mohesh, another member of the family, after the mortgage decree had been delivered. The positions of the two purchasers are, therefore, different both in respect to the nature of the purchases and the time during which they were made.

On the 13th August 1878 (that is, 29th Srabun 1285), the mortgagee having died and his estate being in the hands of the Administrator-General, the decree was sold by that officer to Gour Sundar Lahiri, defendant No. 1 in both these cases. Whether Gour Sundar Lahiri was the real purchaser or a purchaser representing others is one of the principal points for our decision in these cases. When the mortgage decree was sold, it would seem that it was then under execution. After this sale, several applications were made to execute this decree after substitution of the name of the assignee for that of the original decree-holder, but in none of these applications was any further step taken towards execution of the decree or any order made for substitution of the name of the assignee. On the 18th July 1885, after notice to the judgment-debtors, the name of Gour Sundar Lahiri was substituted for that of the original decree-holder, and proceedings in execution commenced by attachment of some of the mortgaged properties. Claims were thereupon made by the two plaintiffs in the suits before us, but their objections were disallowed on the 3rd February 1886, the Subordinate Judge holding that the purchases made conferred titles subject to the mortgage, and were, therefore, inadmissible under s. 278, the claimants having only the right to redeem the mortgage by paying the amount due to the mortgagee. The two suits now before us were accordingly brought by these parties, the plaintiffs asking for decrees declaring their right to hold the properties

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purchased by them free of the mortgage for various reasons, which will be presently considered, or for any other relief which the Court might think proper and just.

The Subordinate Judge has given both plaintiffs a decree.

In appeal, it is first contended that the plaintiffs have no right to sue by reason of s. 244 of the Code of Civil Procedure, inasmuch as they were representatives of the original judgment-debtor. The position of the two plaintiffs is entirely different so far as they are affected by the operation of this section. The plaintiff Hem Chunder Chowdhry (in appeal 103) is a purchaser in execution of a money decree against the mortgagors. He is, consequently, not a voluntary purchaser, and, as has been held by their Lordships of the Judicial Committee of the Privy Council, his title is not one of privity with the mortgagors, but in some respects adverse to them. We think, therefore, that he cannot be considered as a representative of the judgment-debtors, mortgagors, within the terms of s. 244. The cases to which we refer are *Dinendronath Sannyal* v. *Raj Coomar Ghose* (1), *Anundmoyee Dossee* v. *Dhonendro Chunder Mookerjee* (2); and we may also refer to the case of *Lalla Prabhulal* v. *Mylne* (3). Mr. Bell, for the appellants, however, contends that, inasmuch as the plaintiffs purchased *pendente lite*, and are therefore bound by the mortgage decree, they are similarly bound, without being formally placed on the record or receiving any notice of the proceedings taken in execution, in all proceedings up to the satisfaction of the decree. He particularly refers to the order of the 18th July 1885, under which the name of the purchaser of the mortgage decree, Gour Sundar Lahiri, was placed on the record under s. 232 as assignee of the decree. It is contended that a notice under s. 232 to the judgment-debtors is binding on a purchaser *pendente lite*, and that, consequently, the order so passed precludes the plaintiff from bringing a suit to contest the validity of that mortgage. It has already been stated why we consider that in appeal No. 103 the plaintiff is not the representative

(1) L. R., 8 I. A., 65; I. L. R., 7 Calc., 107.
(2) 14 Moore's I. A., 101; 8 B. L. R., 122.
(3) I. L. R., 14 Calc., 401.

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of the judgment-debtor within the terms of s. 244. In this particular instance, there are, however, other reasons which, in our opinion, prevent us from holding that he as well as the plaintiff in the other case was bound by the terms of that order.

The proceeding in execution then before the Courts cannot, in our opinion, be regarded as a *bonâ fide* proceeding. Gour Sundar Lahiri was, in our opinion, not the real purchaser of the mortgage decree, but was only a name representing others, *viz.*, the judgment-debtors, and possibly Mohesh Bhaduri, their brother. Whether the transaction was one including only the judgment-debtors or also Mohesh Bhaduri is not material for the purposes of deciding this matter. It is sufficient to say, for reasons which will be presently given, that we consider that the purchase by Gour Sundar Lahiri was not a transaction for his own benefit, but for the benefit of the judgment-debtors. In this view, the application of Gour Sundar Lahiri—that his name should be substituted for that of the decree-holder as assignee of the decree under s. 232, and asking the Court to pass an order for such substitution—was a sham. It amounted to the judgment-debtors asking the Court for service of a notice on themselves. If the real position of the parties had been made known to the Subordinate Judge, there can be no doubt that he would have refused to recognize such an assignment or to issue the notice required by s. 232. We, accordingly, hold that the plaintiffs are not precluded in these suits from questioning the validity of the order passed under s. 232.

It now becomes necessary to consider, first, the evidence regarding the character of the purchase made by Gour Sundar Lahiri of the mortgage decree, and next, how far the execution of that decree as against the plaintiff is barred by limitation. The evidence of Gour Sundar himself is most important as showing the nature of his purchase. He is, no doubt, a man of insignificant means, but it is not improbable that he had sufficient money, but not much more than sufficient, to have bought this decree. He is a relation of the judgment-debtors, and admits that he is perfectly ignorant of the nature of his purchase; that he has taken no steps to make himself acquainted with what he purchased; that he delayed several years to take any real steps to reap any

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benefit from his purchase; and, lastly, that even now he is not prepared to execute his decree against the mortgagors. He also admits that he has taken very little interest in defending these suits. All these, we are asked to believe, are the acts of one who, even if he could have found means to purchase a mortgage decree, undoubtedly would have left to himself very little other money after such a purchase. We have next the evidence of mookhtears who were consulted in matters connected with this purchase and with proceedings taken in execution of the decree after the purchase. The principal person employed, Janoki Nath Bose, distinctly declares that he never acted for or was consulted by Gour Sundar Lahiri; that the persons with whom he was in communication throughout were the mortgagors or some one of them, or Mohesh, their brother, acting on their behalf. There has been much argument addressed to us regarding the order of the Subordinate Judge, admitting, as evidence in this case, certain letters purporting to have been written by Mohesh Bhaduri to this witness. Independently of those letters, we think there is ample evidence to show that Gour Sundar Lahiri was not the actual purchaser of the mortgage decree, and that the Bhaduris, either the mortgagors or the mortgagors with Mohesh, their brother, were the actual purchasers and were the only persons interested in the purchase. There is also evidence, independently of these letters, to show that Mohesh, a member of the family of the mortgagors, has acted on behalf of the other members, the mortgagors, in all these transactions. Upon this ground we think that the letters would be admissible as evidence. But independently of the evidence of these letters, as has been already stated, there is ample evidence on the record to show that Mohesh acted on behalf of the mortgagors, and that Gour Sundar was in no way concerned in the purchase except in regard to the use of his name in the proceedings in execution. For these reasons we hold that the purchase by Gour Sundar Lahiri was a matter of fact a *benami* purchase. That being so, the applications made in his name, in August and December 1880, were not applications made in accordance with the law within the terms of Art. 179, Sch. II of the Limitation Act of 1877. We follow the opinion expressed in regard to this section by

the learned Judges in the cases of *Abdul Kureem* v. *Chukhun* (1), and *Denonath Chuckerbutty* v. *Lallit Coomar Gangapadhya* (2), and also in an unreported case (Mis. App. 453 of 1885) decided by Wilson and Porter, JJ., on the 20th April 1885. We have been referred to two cases of an earlier date—*Purna Chundra Roy* v. *Abhoya Chundra Roy* (3) and *Nadir Hossein* v. *Pearoo Thovildarinee* (4) in which a contrary opinion was expressed. But we prefer to follow the rule more recently laid down by two Benches of this Court, which is in accordance with the opinion which we ourselves entertain. We, accordingly, hold that a *benami* purchaser is not competent to make an application under s. 232, and that, consequently, the applications made in August and December 1880 were not applications under the Code of Civil Procedure in accordance with law, so as to prevent the operation of the ordinary law of limitation. It is admitted that had it not been for these applications, the subsequent application for execution in 1885 would have been barred. The result, therefore, is that in respect of appeal No. 103, although the plaintiff bought in execution of a money decree *pendente lite*, while proceedings under the mortgage were being taken, and he is, therefore, bound by the decree subsequently passed, that decree has become inoperative by reason of the law of limitation, and therefore the defendant is not entitled to enforce the mortgage as against the plaintiff. The plaintiff will, consequently, receive a declaratory decree to that effect.

The other case stands on different grounds. The plaintiff purchased from the three mortgagors and Mohesh one of the properties previously mortgaged as mentioned in Sch. II of the mortgage decree, after that decree had been delivered. The conveyances are dated 12th March and 18th May 1878. He also advanced Rs. 10,000, on the 13th June of the same year, to the same four persons upon mortgage of another property comprised in that decree. He is, therefore, not only bound by the mortgage decree, but, by reason of his having purchased privately from the mortgagors, must be regarded as in privity

(1) 5 C. L. R., 253.
(2) I. L. R., 9 Calc., 633 ; 12 C. L. R., 145.
(3) 4 B. L. R., App., 40.
(4) 14 B. L. R., 415.

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with them, and as their representative within the terms of s. 244. He would clearly not be entitled to bring a separate suit, such as he has now done, were there not circumstances in his case which, in our opinion, establish fraud so as to entitle him to relief, and place the case beyond the operation of s. 244.

[Their Lordships then went into the circumstances alluded to, which are not material to this report, and concluded]:—

We agree, therefore, with the Subordinate Judge that the plaintiff is entitled to a decree declaring that the mortgage decree cannot be executed in respect to Ekdhala which has been purchased by him.

The appeals will, therefore, be both dismissed with costs.

J. V. W. *Appeals dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Banerjee.

1889 *February* 4.

HARI GOBIND ADHIKARI (PLAINTIFF) *v.* AKHOY KUMAR MOZUMDAR AND OTHERS, MINORS, BY THEIR MOTHER AND GUARDIAN CHANDRATARA, AND OTHERS (SOME OF THE DEFENDANTS).*

Parties—Right of suit—Benamidar—Suit for declaration of title to, and for possession of, immoveable property—Disclaimer of real owner.

In a suit for a declaration of the plaintiff's right by purchase to, and for possession of, certain immoveable property, it was found on the evidence that the plaintiff was merely a *benamidar* for one of the defendants, and had no right to the property. That defendant in his evidence disclaimed any title to the property: *Held*, that the plaintiff had no right to sue, being a mere *benamidar*, and neither the disclaimer of the real owner, nor the fact that he was a party to the suit, was sufficient to enable the plaintiff to maintain the suit when instituted, or to entitle him to have the real owner added as a co-plaintiff.

Prosunno Coomar Roy Chowdhry v. *Gooroo Churn Sein* (1) followed.

THE plaintiff in this case sued to obtain possession of a piece of land, and certain houses, orchards and tanks appertaining to it, to which he alleged he had acquired a title by purchase from one Radha Kanto Bhowmik, defendant No. 13.

* Appeal from Appellate Decree, No. 73 of 1888, against the decree of D. Cameron, Esq., Judge of Tipperah, dated the 23rd of August 1887, affirming the decree of Baboo Nil Madhub Bandopadhya, Subordinate Judge of Tipperah, dated the 24th of July 1886.

(1) 3 W. R., 159.

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The property in suit in 1853 formed part of a revenue-paying estate belonging to one Kristo Churn Mozumdar. That estate was sold for arrears of revenue, and the purchaser granted to Kristo Churn a permanent lease of the portion in dispute, which he held as his *khanabari*. Subsequently, in 1863, Kristo Churn went to live in another district, leaving one Brindabun Mozumdar in charge of the *khanabari*.

The plaintiff's case was that the property was sold in 1877 by Kali Komal Mozumdar, the son of Kristo Churn, to Radha Kanto Bhowmik, who, in his turn, sold it to the plaintiff in 1883, and that the defendants opposed him in obtaining possession of his purchase. According to the defendants Nos. 1 and 2, the property became the ryoti-holding of Brindabun Mozumdar from whom they acquired it under a bill of sale in 1873, and they had since been in possession of it. The defendant No. 11 disclaimed having any interest in, or title to, the property.

The suit was dismissed in the first Court on the ground that the purchases, by both Radha Kanto Bhowmik and by the plaintiff, were *benami* transactions, and that the suit was therefore not maintainable. That Court found that Radha Kanto's purchase was *benami* for his employers Shib Chunder Aich and his brother, and that the plaintiff's purchase was *benami* for Dinobundhu Nundi, defendant No. 11.

An appeal by the plaintiff was dismissed by the Judge, who agreed in the view taken by the first Court.

The plaintiff appealed to the High Court on the ground (among others) that the finding that his purchase was *benami* for the defendant No. 11, was not sufficient to disentitle him from maintaining the suit, the alleged *benamidar* being a party defendant, and having deposed to the effect that he has no interest in the property in dispute.

Baboo *Hari Mohun Chukrabati* for the appellant.

Baboo *Baikant Nath Das* for the respondents.

The cases cited and arguments sufficiently appear in the judgment of the Court (PRINSEP and BANERJEE, JJ.) which was delivered by

BANERJEE, J.—This is an appeal by the plaintiff against the udgment of the lower Appellate Court, affirming that of the Court

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of first instance, which dismissed the plaintiff's suit upon the ground that he had no right to maintain it, he being merely a *benamidar* for the real owner, defendant No. 11.

The objection urged in second appeal is that as defendant No. 11 is a party to this suit, and has disclaimed all interest in the subject-matter thereof, the defect in the framing of the suit and in the plaintiff's title is thereby cured. It is also contended upon the authority of the case of *Sitanath Shah* v. *Nobin Chunder Roy* (1) that the Courts below ought, if necessary, to have made the defendant No. 11 a co-plaintiff with the appellant.

We do not think that these contentions are sound. The finding arrived at by the Courts below is that the plaintiff has no right to the property in suit, and is merely a *benamidar* for defendant No. 11. That being so, and his prayer in the plaint being for possession upon declaration of his right by purchase in respect of the property in suit, we do not see how the fact of the real owner having been made a defendant in the case can entitle the plaintiff to maintain this suit. Then, as to the real owner's disclaimer in his deposition in this suit, we do not think that that is sufficient to give the plaintiff any right to maintain this suit. Such a right must have come into existence before the date of the institution of this suit. Now, the plaintiff does not allege that either by any bill of sale or by any virtual transfer from the rightful owner, the right to the property in suit has been vested in him. His case from the beginning was that he was the real owner, and that case has been found to be false. A statement by any party to the suit subsequent to the date of its institution cannot give the plaintiff a title. If any authority was needed for such a proposition, we might refer to the observations of the Judicial Committee in the case of *Amirto Lal Bose* v. *Rajonee Kant Mitter* (2).

Then it has been contended that the case cited is sufficient authority in favor of the plaintiff, appellant. We do not think that that is so. That case is distinguishable from the present. That was a case upon a mortgage deed, and was between one of the parties to that deed, and the assignee of the other. It

(1) 5 C. L R., 102. (2) 15 B. L. R., 10 ; 23 W. R., 214.

does not appear whether in that case the beneficial owner was made a defendant originally ; and this Court, without deciding the question whether the *benamidar* could maintain the suit, simply remanded the case to be decided after making the beneficial owner a co-plaintiff. As pointed out by the Judicial Committee in *Gopeekristo Gossain* v. *Gungapersaud Gossain* (1), a distinction has sometimes been made between suits upon bonds by *benamidars* and suits for recovery of land upon title; and in this latter class of cases, it has always been held that a *benamidar* is not entitled to maintain the suit. To this effect is the authority of the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (2)—a case which is not dissented from but only distinguished by Sir Richard Couch in the late case of *Ram Bhurosee Singh* v. *Bissesser Narain Mohata* (3). And to the same effect is the case of *Fuzeelun Beebee* v. *Omda Beebee* (4). As we are unable to distinguish this case from the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (2), and as the other cases that are cited by the appellant are clearly distinguishable from the present, we must hold as well upon reason as upon authority that the conclusion arrived at by the Courts below is correct. We therefore think that the judgment of the lower Appellate Court ought to be affirmed, and this appeal dismissed with costs.

J. V. W. *Appeal dismissed.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Banerjee.

JOGDAMBA KOER (PLAINTIFF) *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

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Hindu Law, Inheritance—Brother's widow—Survivorship—Benares School of Law.

According to the law and usage of the Benares School of Hindu Law, a brother's widow has no place in the line of heirs ; nor is she entitled to succeed by right of survivorship.

* Appeal from Original Decree, No. 65 of 1887, against the decree of Baboo Nilmoni Das, Subordinate Judge of Patna, dated the 7th of February 1887.

(1) 6 Moore's I. A., 53, at p. 72.
(2) 3 W. R., 159.
(3) 18 W. R., 454.
(4) 10 W. R., 469 ; 11 B. L. R., 60 note.

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Bhuganee Daiee v. *Gopaljee* (1) not followed; *Ananda Bibee* v. *Nownit Lal* (2) followed in principle.

THIS was a suit instituted by one Jogdamba Koer against the Secretary of State for India in Council to recover possession of certain moveable and immoveable properties which originally formed the joint family property of her husband, Ramlall Singh, and his brother Jankisaran Singh, which, on Ramlall's death, became, by the principle of survivorship, the exclusive property of Jankisaran, and passed, on the death of the latter, to his daughter Sahodra, and which, on Sahodra's death, has been taken possession of by the Secretary of State for India in Council on behalf of the Crown under a claim by escheat. The plaintiff alleged that up to the time of Sahodra's death, in April 1884, she was living as a member of the joint family formerly represented by her husband and his brother, and that on Sahodra's death, as the sole surviving member of that family, she became entitled to the properties in suit by survivorship; and further that, as a *gotraja sapinda* of Jankisaran Singh, she was also entitled to the same by the ordinary law of inheritance.

The defendant denied the plaintiff's title, disputed the correctness of the list of the moveables claimed, and alleged that the plaintiff was entitled to maintenance only, and that the same was offered to her, but refused.

The Subordinate Judge dismissed the plaintiff's suit, holding that she was not entitled to take the properties claimed, and that the same had escheated to the Crown.

The plaintiff appealed to the High Court.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Saligram Singh* for the appellant.

The *Senior Government Pleader* (Baboo *Annoda Persád Bannèrjee*) for the respondent.

Mr. *Evans*.—The plaintiff is not excluded entirely from the line of heirs; the rule excluding females is a rule of partial exclusion only, and postpones merely a female's right in favor of males; she would come in after all male relations, cognates or agnates. The

(1) 1 S. D. A., N.-W. P. (1862), 306.
(2) I. L. R., 9 Calc., 315.

following cases show that her exclusion is only partial: *Kutti Ammal* v. *Radhakristna Aiyan* (1) and *Lakshman Ammal* v. *Tiruvengada* (2). The question raised in *Ananda Bibee* v. *Nownit Lal* (3) and in *Jullesur Kooer* v. *Uggur Roy* (4) was one of relative preference and not of total exclusion, and these cases do not, therefore, conclude the matter.

The rule on which total exclusion of females is based is not to be found in the *Mitakshara;* and the doctrine that those only who are named in special texts inherit, is incorrect, as a paternal great-grandmother is entitled to inherit as a *gotraja sapinda* under the *Mitakshara.* A son's widow inherits after the grandmother—See *Balambhatta's Commentaries* on the *Mitakshara.* Widows of *gotraja sapindas* are entitled to inherit—See *West and Bühler's Digest of Hindu Law,* 2nd Edition, pp. 77-78. In *Bhuganee Daiee* v. *Gopljee* (5) the widow of a nearer *gotra sapinda* inherited in preference to a more remote male *gotra sapinda.* The appellant, if not entitled to succeed by right of inheritance, would be entitled to claim the properties by right of survivorship, as she is the last survivor of the family to which the properties belonged. The Hindu Law does not favor escheat, as a "preceptor" and a "pupil" come in between the ordinary heirs and the Crown.

Baboo *Annoda Persad Bannerjee* for the respondent.—Only those females specially mentioned in the texts are entitled to inherit —See *Viramitrodaya, G. C. Sarkar's Translation,* p. 244. The exclusion of females is a total exclusion—See *Mandlick's Vyavahara Mayukha,* pp. 360 361 ; *Sarbadhikari's Tagore Lectures,* p. 440. As to a son's widow inheriting after the grandmother—See *Ananda Bibee* v. *Nownit Lal* (6). Even a grandmother is excluded from the line of heirs–See *Smriti Chandrika,* ch. XI, s. 5, v. 3, 6. In *Strange's Hindu Law,* Vol. I, p. 146, inheritance of females is named as exceptional—See also *Strange's Hindu Law,* pp. 235, 240. A widow of a *gotraja* is not named as an heir in Macnaghten's list—See *Macnaghten's Pr. of Hindu Law,* pp. 33, 34; and it is distinctly affirmed that widows of *gotraja sapindas* are not heirs under the

(1) 8 Mad. H. C., 88.
(2) I. L. R., 5 Mad., 241.
(3) I. L. R., 9 Calc., 315.
(4) I. L. R., 9 Calc., 725.
(5) 1 S. D. A., N.-W. P. (1862), 306
(6) I. L. R., 9 Calc., 315.

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Benares School—See *Mandlick's Vyavahara Mayukha*, pp. 357, 377; *Sarbadhikari's Tagore Lectures*, pp. 665, 673. As to the case law on the subject, the case of *Lallubhai Bapubhai* v. *Cassibai* (1) shows that in Bengal and Madras women are incapable of inheriting unless named by special texts. *Soodeso* v. *Bisheshur Singh* (2) lays down that a brother's widow is not in the line of heirs—See also *Dibraj Koonwar* v. *Sooltan Koonwar* (3). Under the Benares School none but female expressly mentioned can inherit—See *Gauri Sahai* v. *Itukho* (4); *Jogat Narain* v. *Sheo Das* (5); *Ananda Bibee* v. *Nownit Lal* (6); and *Jullessur Kooer* v. *Uggur Roy* (7). The case of *Kutti Ammal* v. *Radhakristna Aiyan* (8) is based upon a mistake in *Colebrooke's Translation of the Mitakshara;* and the decision of *Lakshman Ammal* v. *Tiruvengada* (9) is obiter as to the claim of the sister's sons. The right of inheritance of females entering the *gotra* by marriage, and acquired *sapindaship* through their husbands, is denied in *Mari* v. *Chinammal* (10). As to the widow's claim to succeed by survivorship—See *Ananda Bibee* v. *Nownit Lal* (11).

The judgment of the Court (PETHERAM, C.J., and BANERJEE, J.), after stating the facts, as set out above, proceeded as follows :—

The plaintiff (appellant) contends that she is entitled to the properties in dispute as well by inheritance as by right of survivorship, and that, consequently, there can be no escheat. We shall consider these two grounds of the plaintiff's claim separately.

Upon the question of the plaintiff's title by inheritance, the learned Counsel for the appellant conceded (and, we think, very properly conceded) that in the face of the decisions of this Court in the cases of *Ananda Bibee* v. *Nownit Lall* (6) and *Jullessur Kooer* v. *Uggur Roy* (7), he could not contend for the broad proposition that the plaintiff, as the widow of a *gotraja sapinda* of Jankisaran, was entitled to a place in the order of succession

(1) I. L. R., 5 Bom., 110.
(2) 2 S. D. A., N.-W.P. (1864), 375.
(3) 1 S. D. A., N.-W. P. (1862), 240.
(4) I. L. R., 3 All., 45.
(5) I. L. R., 5 All., 311.
(6) I. L. R., 9 Calc., 315.
(7) I. L. R., 9 Calc., 725.
(8) 8 Mad. H. C., 88.
(9) I. L. R., 5 Mad., 241.
(10) I. L. R., 8 Mad., 107.
(11) I. L. R., 9 Calc., 315.

immediately after her husband. What he contended for was that, though the plaintiff may not have such a high place, she was not excluded from the line of heirs altogether; that the rule excluding females from succession was a rule of partial and not total exclusion, and merely postponed their rights in favor of males; that the proper position of the plaintiff was one after all male relations, whether agnates or cognates; and that the two decisions of this Court, referred to above, did not conclude the present question, as they had only to determine whether certain female relatives were entitled to succeed in preference to the male relatives who opposed them. And in support of the theory of partial exclusion or postponement of claims of female relatives, we were referred to two Madras cases: *Kutti Ammal* v. *Radhakristna Aiyan* (1) and *Lakshman Ammal* v. *Tiruvengada* (2).

Now though the grounds upon which the two decisions of this Court, above referred to, are based, leave no room for the appellant's contention, yet, as the immediate question for decision was one of relative preference, and not of absolute exclusion of certain female heirs, those decisions cannot be held to conclude the present contention.

That being so, and there being the two Madras decisions in favor of that contention, it becomes necessary to examine the authorities bearing on the question now before us.

We shall consider these authorities under three heads: *first*, the original authorities; *second*, the opinions of later writers on Hindu Law; and, *third*, the decisions of Courts of Justice.

Under the first head, if it were necessary to refer to the remoter sources of the Hindu Law, we should find ample authority for the total exclusion of women from inheritance. There is the well-known text of the *Taittiriya Yajur Veda Sanhita* (*Kanda VI, Prapathaka V, and Anuvaka VIII*): "Therefore females are feeble and unworthy of inheritance." Then there is a passage of the *Nirukta* (*Vedic Glossary*) to this effect: "Therefore it is known that a male is the taker of wealth, and that a female is not a taker of wealth"—(see *Roth's Edition of Yaska*, p. 53 and

(1) 8 Mad. H. C., 88. (2) I. L. R., 5 Mad., 241.

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Satyavrata, Samasrami's Edition, Vol. II, p. 259) ; and there is the *Sutra or Aphorism of Baudhayana* (*Prasna II, Kanda II*, 27) : " Nor (ought she) to inherit. For the Veda (says) " women are not considered to have a right to use sacred texts, nor to take the inheritance," which forms the basis of the law on the point. Nor is this exclusion of females a feature peculiar to Hindu Law. The exigencies of primitive society stamped that feature more or less upon ancient law everywhere. In the present instance the text itself contains the reason for the rule it lays down. It says women are feeble, and, therefore, unworthy of inheritance. But we need not go behind works like the *Mitakshara* and the *Viramitrodaya* ; our duty being, as the Judicial Committee point out in the case of the *Collector of Madura* v. *Moottoo Ramlinga Sathupathy* (1), not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which we have to deal, and has there been sanctioned by usage. We shall, accordingly, confine our attention to the consideration of the *Mitakshara*, the *Viramitrodaya*, the *Vaijayanti*, and the *Commentaries* on the *Mitakshara* by *Viseswara* and *Balambhatta*, these being the leading authorities at the present day of the Benares School of Law, which is the law governing this case ; and we shall incidentally consider the *Vyavahara Mayukha*, the *Smriti Chandrika* and the *Dayabhaga* and the *Vivada Chintamani*, which supplement the *Mitakshara* in the Maharastra, the Dravida and the Mithila School.

The *Mitakshara* lends no direct support to the appellant's contention. It divides the remoter heirs after the brother's son into three classes (ch. II, s. 1, v. 2, 3) : (1) the *gotrajas* (gentiles) ; (2), the *bandhus* (cognates) ; (3), certain specified strangers, *viz.* the preceptor, the pupil, and the fellow-student in the Vedas ; these classes come in the order in which they are named above ; and, in default of all these, the King takes the property, except in the case of Brahmans (an exception which does not hold good in British India—See *The Collector of Masulipatam* v. *Cavaly*,

(1) 12 Moore's I. A., 397.

Vencata Narrainapah) (1). Now the only class under which the appellant can come, is the first, she being a *gotraja* of her husband's brother in this sense, that she has by her marriage become of the same *gotra* as her husband and his brother; and she is also a *sapinda* of her brother-in-law according to the meaning assigned to that term in the *Mitakshara* (see the *Commentary* on *Yajnavalkya*, I, 52). But neither the brother's widow, nor the widow of any other collateral agnate, is mentioned as an heir. It might be contended that the text of *Baudhayana* cited above, upon which the exclusion of females is based (see *Viramitrodaya*, *G. C. Sirkar's Translation*, p. 198), is not referred to in the *Mitakshara*, and that the doctrine that only those female relatives are heirs who are named in special texts cannot be true, as the paternal great grandmother, who is not named in any special text, is expressly mentioned as entitled to inherit as a *gotraja sapinda* in the *Mitakshara*. But to this the answer is that *Baudhyana* has been distinctly recognised as an authority by *Vijnaneswara* (see the *Commentary* on *Yajnavalkya*, I, 4, 5), and that though the paternal great grandmother may not be named in any text, yet her case, and that of other female lineal ancestors, closely follow that of the grandmother, and are, upon reason and common sense, very different from that of the widows of collateral agnates. And it is singular that if *Vijnaneswara* meant to include them, he should not have named any one of them as coming in the line of heirs. The preponderance of reason seems to be in favor of the view that the *Mitakshara* is opposed to the appellant's claim. As the Privy Council observed in the case of *Lallubhai Bapubhai* v. *Cassibai* (2), perhaps the most that can be said is that the Mitakshara is not inconsistent with the appellant's claim, if such claim is otherwise made out. One thing, however, is clear: the *Mitakshara* lends no support to the appellant's contention that though, in consequence of texts and decisions adverse to women's heritable rights, the appellant's claim has to be postponed in favor of every male heir, whether a *gotraja* or a *bandhu*, she may yet come in as an heir in default of all male *gotrajas* and

(1) 8 Moore's I. A., 500. (2) I. L. R., 5 Bom., 110.

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bandhus. If the appellant can come in as an heir at all under the *Mitakshara*, it must be as a *gotraja sapinda* ; and if, therefore, her claim has to be postponed in favor of a *bandhu*, it must so far as the *Mitakshara* is concerned, be postponed for ever. For it is only upon failure of *gotrajas* that *bandhus* inherit—(*Mitakshara*, ch. II, s. vi, 1).

Turning now to the *Viramitrodaya*, which is a work of high authority in the Benares School, and is followed in matters left doubtful by the *Mitakshara*—see *Gridhari Lall Roy* v. *The Government of Bengal* (1)—we find that the appellant's claim is distinctly negatived there. The author notices an interpretation of the Vedic text cited above, according to which it has nothing to do with inheritance, but he considers that interpretation unsatisfactory, as it contradicts the text of *Baudhayana* "Hence," says he, "it cannot but be held that the text of *Sruti* does prohibit women's right of succession, inasmuch as otherwise the quotation (by *Baudhayana*) of that text as establishing the position would be unreasonable."—(*G. C. Sarkar's Translation*, pp. 198, 199). And in another place, when speaking of succession to woman's property (with reference to which one would have expected the recognition of woman's heritable right to a larger extent) he says: "But the daughter-in-law, and others (of the sex), are entitled to food and raiment only; for the nearness as a *sapinda* is of no force when it is opposed by express texts. Since a text of the *Sruti* declares: 'Therefore women are devoid of the senses and incompetent to inherit; and a text of *Manu* founded upon it, says: 'Indeed the rule is that, devoid of the senses, and incompetent to inherit, women are useless.' 'The conclusion arrived at by the author of the *Smriti Chandrika*, *Haradatta* and other southern commentators, as well as by all the oriental commentators, such as *Jimuta Vahana*, is, that those women only are entitled to inherit whose right of succession has been expressly mentioned in the texts, such as—'the wife and the daughters also, &c.,—but that others are certainly prohibited from taking heritage by the texts of the *Sruti* and *Manu*."—(*G. C. Sarkar's Translation*, p. 244.)

(1) 12 Moore's I. A., 448.

As to this passage, West, J., in *Lallubhai Bapubhai* v. *Mankuvarbai* (1), observes that *Manu* has been misquoted here. But as the Judicial Committee pointed out in the *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2), the question is not whether the authority of *Manu* has been misquoted, but whether the *Viramitrodaya* itself is an authority for the Benares School; and, as to this latter question, there can be no room for doubt or discussion. The truth is that commentaries and digests, like the *Mitakshara* and *Viramitrodaya*, owe their binding force not to their promulgation by any sovereign authority, but to the respect due to their authors, and still more to the fact of their being in accordance with prevailing popular sentiment and practice. Their doctrines may often have moulded usage, but still more frequently they have themselves been moulded according to prevailing usage of which they are only the recorded expression. This appears notably from the discussion in the *Mitakshara* in the section on the nature of property, where popular usage is referred to as one of the strongest points in favor of the author's doctrine, that the son's right in the father's property arises by birth (Ch. I, s. i, 23). Upon the present question, the doctrine stated by *Mitra Misra*, which is supported by the general consensus of opinion of a number of approved commentators named by him, should be accepted as a correct statement of the prevailing law, even though the reasoning in support of the doctrine may be in some respects faulty.

It should be observed that the exclusion of females, that is laid down in the texts of the *Sruti* and of *Baudhayana*, and is affirmed by *Mitra Misra*, is a total exclusion from inheritance, and is not a mere postponement of their claims in favor of male heirs.

Viseswara in his commentary on the *Mitakshara*, the *Subodini* (see *Mandlick's Vyavahara Mayukha*, pp. 360, 361), and in the *Madana Parijuta* (see *Sarbadhikari's Tagore Law Lectures*, p. 440) clearly excludes the widows of collateral *gotrajas*, when he does not name them in his detailed list.

The *Vaijayanti* places the widowed daughter-in-law immediately after the widow (a position which is directly opposed to

(1) I. L. R., 2 Bom., 441. (2) 12 Moore's I. A., 397.

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the *Mitakshara* itself), but it does not help the appellant very much, for it does not name the widow of any collateral *gotraja sapinda* in its list of *sagotra sapinda* heirs—(see *Sarbadhikari's Tagore Law Lectures*, p. 478).

Balambhatta lends some support to the appellant's claim by assigning to the son's widow a place immediately after the grandmother. But since the decision in *Ananda Bibee* v. *Nownit Lal* (1) that can no longer be considered good law as was, conceded in the argument (see *Sarbadhikari's Tagore Lectures*, p. 481).

The *Vyavahara Mayukha* throws very little light upon the present question. West, J., in *Lallubhai Bapubhai* v. *Mankuvarbai* (2) observes: "If the foundation of the rights of widows of *gotrajas* under the *Mitakshara* is slender, under the *Mayukha* it may be called almost shadowy."

The *Smriti Chandrika* is decidedly opposed to the appellant's claim. It rigidly enforces the *Sruti* text, declaring the incompetency of women to inherit, and it excludes even the grandmother from the line of heirs (see Ch. XI, s. v, 3-6).

The *Dayavibhaga*, in discussing the widow's succession, explains the text of *Sruti* cited above in a sense which makes it perfectly harmless as regards the heritable rights of women—(see *Burnell's Translation*, p. 33).

This might lead one to think that the author was in favor of a liberal admission of females into the order of succession. But, when considering the succession of *gotrajas*, he gives us no indication in that direction, and his enumeration of *gotrajas* is almost the same as that in the Mitakshara. The truth seems to be that the author's interpretation of the *Sruti* was only an additional argument in favor of the succession of the widow whose right had come to be generally recognised; but the author was not prepared to carry that argument to its consequences by admitting other females whose rights were not so recognised.

The *Vivada Chintamoni* is wholly silent on the point.

The above examination of the *Mitakshara* and the leading authorities that supplement it in the different schools, shows that

(1) I. L. R., 9 Calc., 315. (2) I. L. R, 2 Bom., 447.

none of them expressly mentions the brother's widow or the widows of *gotraja sapindas* as entitled to succeed; only two of them, the commentary of *Ballambatta* and the *Dayavibhaga* afford any ground in favor of their claim; while two others, the *Viramitrodaya* and the *Smriti Chandrika*, expressly deny their right; and the rest are either silent on the point or imply their exclusion by omitting to mention them in their detailed list of heirs. In this state of things, considering the weight attached to the *Viramitrodaya* in the Benares School, we think, so far as the original works on Hindu Law are concerned, the weight of authority is against the appellant's contention that she is in the line of heirs.

Turning now to the later writers, European and Indian, who have examined the subject, we find that, according to Sir Thomas Strange, the instances in which females are allowed to inherit are deemed as exceptional, 'the general principle being that the sex is incompetent to inherit' (1 *Strange's Hindu Law*, 146). *Sutherland*, speaking of the daughter-in-law, says: "Nor does there exist any supposed case in which she could inherit" (2 *Strange's Hindu Law*, 235); and, in another place, speaking of the niece, he observes: "In the series of heirs the niece is nowhere enumerated, and my Pandit agrees with me that the estate of the deceased would escheat rather than descend to a niece." (2 *Strange's Hindu Law*, 240), *Macnaghten* does not name the widow of any collateral *gotraja sapinda* in his enumeration of heirs (*Principles of Hindu Law*, pp. 33, 34), nor does *Shama Charan* in the list given by him in the *Vyavastha Chandrika* (Vol. I, pp. 182, 204); while *Mayne* (*Hindu Law*, para 541)., *Mandlick* (*Vyavahara Mayukha*, pp. 357-377), and *Sarbadhikari* (*Tagore Law Lectures*, pp. 665-673) distinctly affirm that the widows of *gotraja sapindas* are not regarded as heirs under the law of the Benares School. Against this view, however, there is the opinion of *West and Buhler* (*Digest of Hindu Law*, 2nd Ed., pp. 177, 178) that widows of *gotraja sapindas* are entitled to inherit under the *Mitakshara*; but that opinion has reference to the Mitakshara Law of the Bombay Presidency, and not to the law of the Benares School where the *Mitakshara* is supplemented by the *Viramitrodaya*.

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We come next to the most important class of authorities, the decisions of Courts of Justice.

In *Lallubhai Bapubhai* v. *Cassibai* (1), which is the leading case on the point in Bombay, while recognising the heritable rights of female *gotraja sapindas*, the Privy Council base that recognition not upon the *Mitakshara*, but upon the prevailing usage of the Bombay Presidency; and, with reference to the law of the other schools, the judgment of the Judicial Committee contains the following important observation: "According to the received doctrine of the Bengal and Madras Schools, women are held to be incompetent to inherit, unless named and specified as heirs by special texts. This exclusion seems to be founded on a short text of *Baudhayana*, which declares that women are devoid of the senses and incompetent to inherit. The same doctrine prevails in Benares; the author of the *Viramitrodaya* yields, though apparently with reluctance, to this text—(Ch. 3, Part 7.)"

In *Soodeso* v. *Bisheshur Singh* (2), the Sadr Court of the North-Western Provinces held that the brother's widow is not in the line of heirs. That is a case distinctly in point. In *Dilraj Koonwar* v. *Sooltan Koonwar* (3), a son's widow was held to be no heir under the *Mitakshara*. The Allahabad High Court in *Gauri Sahai* v. *Rukho* (4) held that none but females expressly named as heirs can inherit under the law of the Benares School, and that the father's sister's sons are entitled to succeed to the exclusion of the paternal uncle's widow, and the learned Judges observed: "We think it, however, unnecessary to discuss the question, so fully argued in the judgment of the Bombay Court, whether the wife of a *gotraja sapinda* is to be held under the *Mitakshara* to be a *gotraja sapinda*? We are of opinion that looking to the *received* interpretation of the law, and the customary law prevalent in this part of India, none but females expressly named as heirs can inherit." And this view of the law is affirmed as correct by a Full Bench of that Court in *Jagat Narain* v. *Sheo Das* (5). Against these decisions there is only one case that can be

(1) I. L. R., 5 Bom., 110. (3) S. D. A., N.-W.-P. (1862) 240.
(2) S. D. A., N.-W.-P. (1864) 375. (4) I. L. R., 3 All., 45.
(5) I. L. R., 5 All., 311.

cited on the other side, the case of *Bhuganee Daiee* v. *Gopaljee* (1). In that case the widow of a nearer *gotraja sapinda* was allowed to succeed in preference to a more remote male *gotraja sapinda*. But the decision is based, not upon the right of inheritance, but upon the right by survivorship. The question, whether the plaintiff in this case is entitled to suceed upon this latter right, will be considered presently.

In the case of *Lalla Jatee Lall* v. *Dooranee Kooer* (2), a Full Bench of this Court held that the step-mother is no heir under the *Mitakshara*. In *Ananda Bibee* v. *Nownit Lal* (3), after an elaborate examination of the authorities, Mitter and Maclean, JJ., came to the conclusion that, according to the law and usage of the Benares School, no females, except those expressly named as heirs, can succeed, and they, accordingly, dismissed the claim of the daughter-in-law on the ground that she was not in the line of heirs at all. And in *Jullessur Kooer* v. *Uggur Roy* (4) this Court disallowed the sister's claim to inherit upon the ground that, of female *sapindas*, only those that are specified by name as heirs can inherit according to the Mitakshara Law.

It remains now to notice the Madras decisions. Neither of the two cases cited on behalf of the appellant is in point, as they both relate to the succession of the sister. But they were referred to in support of the argument that, though certain female relations are not entitled to succeed as *gotraja sapindas* or *bandhus* in preference to any male heir, yet they come in as heirs before the estate passes to any stranger; or, in other words, that the rule about exclusion of females is one of partial and not total exclusion, the claims of the excluded females being only postponed in favor of those of males. Now in the earlier of the two cases, that of *Kutti Ammal* v. *Radhakristna Aiyan* (5), the decision in favor of the sister's right is evidently based upon a mistake in *Colebrooke's* translation of the *Mitakshara*. The learned Judges, after citing the case of

(1) 1 S. D. A., N. W.-P. (1862), 306.
(2) W. R., Sp. No., 173.
(3) I. L. R., 9 Calc., 315.
(4) I. L. R., 9 Calc., 725.
(5) 8 Mad. H. C., 88.

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Gridhari Lal Roy v. *The Government of Bengal* (1), and quoting the *Mitakshara* (Ch. II, s. vii, para 1,) according to *Colebrooke's* translation, which runs thus: "If there be no relation of the deceased, the preceptor, or, on failure of him, the pupil inherits, by the text of *Apastamba*, 'If there be no male issue, the nearest kinsman inherits, or, in default of kindred, the preceptor"—observe: "It follows from the above not only that in regard to cognates is there no intention expressed in the law or to be inferred from it of limiting the right of inheritance to certain specified relationships of that nature, but that, in regard to other relationships also, there is free admission to the inheritance in the order of succession prescribed by law for the several, classes, and that all relatives, however remote, must be exhausted before the estate can fall to persons who have no connection with the family." These observations would have been perfectly correct if the above passage of the *Mitakshara*, on which they are based, had been a correct translation of the original. But that is not so. The word translated 'relations' is *bandhu*, and that rendered as 'kinsman and kindred' is *sapinda* in the orginal, and these are technical words very much restricted in their signification. There is, therefore, really no authority for the proposition that all relations, however remote, must be exhausted before strangers can claim the estate.

In the second case, that of *Lakshmanammal* v. *Tiruvengada* (2), though in the view that the Court took of the superior claim of the sister's son, it was not at all necessary to decide whether the sister was an heir or not, yet the learned Judges threw out the observation that *Vijnaneswara* recognised the texts excluding females so far as to give priority to males, and that it was not intended absolutely to exclude all but certain excepted females. Now reading the *Mitakshara* and the *Viramitrodaya* together, we must say, with all respect for the learned Judges, that we do not find any ground for limiting the texts exculding women in that way. The texts say 'women are incompetent to inherit,' and we can find no authority for saying that they mean that women are incompetent to inherit only in competition with males.

(1) 12 Moore's I. A., 448. (2) I. L. R., 5 Mad., 241.

In a still later case—*Mari* v. *Channamimal* (1)—which is somewhat more in point, and in which a Full Bench of the Madras High Court has held that the step-mother was not entitled to inherit in preference to a paternal uncle, Turner, C.J., in delivering the judgment of the majority of the Court, made the following important observation: "No decision of the Sadr Adalat, the Supreme Court or this Court has been cited, nor has any usage been proved by which a right of succession has been recognised as appertaining to a step-mother or to any of the females who by marriage have entered the *gotra* and acquired *sapindaship* solely through their husband; for these reasons the claim of the step-mother as a *gotraja sapinda* has not been in my judgment established, and the claim of the paternal uncle must be allowed."

Upon a review of the foregoing authorities we come to the conclusion that, according to the law and usage of the Benares School of Hindu Law, which governs this case, the brother's widow is not in the line of heirs at all.

We have now to consider the second ground upon which the appellant puts her case. It is contended that, even if the appellant is not entitled to the properties in suit by right of inheritance she can claim them by right of survivorship as the last surviving member of the family to which the same belonged. No authority was cited in support of this contention, and, perhaps, the only authority that can be cited for the appellant is the case of *Bhuganee Daiee* v. *Gopalajee* (2) already referred to. No authority is referred to in support of that decision except the opinion of the Pandit upon which it is based; and even that opinion is not given *in extenso*. On the other hand, there is the case of *Ananda Bibee* v. *Nownit Lal* (3), which is binding upon us and which is clear authority to the contrary. In that case the same contention was raised in favor of the daughter-in-law, but the Court rejected it and allowed the estate to pass to remote *bandhus*, who were no members of the family, which originally owned it, to the exclusion of the daughter-in-law, Mitter J., observing: "It has been said that she, while her father-in-law Gakul Chand was alive, was

(1) I. L. R., 8 Mad., 107.

(2) 1 S. D. A., N.-W. P. (1862), 306.

(3) I. L. R., 9 Calc., 315.

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living with him as a member of a joint Hindu family, and, therefore, on his death, she is entitled to the property left by him. It seems to me that this contention is wholly untenable. The foundation of the right of survivorship is joint ownership. In this case, it cannot for a moment be contended that the plaintiff had any sort of ownership in the property in dispute during the life-time of her father-in-law." These observations are equally applicable, *mutatis mutandis*, to this case. The following passage of the *Viramitrodaya* may be cited in support of the same view: "Her right is only fictional but not a real one: the wife's right to the husband's property, which, to all appearance, seems to be the same (as the husband's right), like a mixture of milk and water, is suitable to the performance of acts which are to be jointly performed; but it is not mutual like that of brothers, hence it is that there may be separation of brothers, but not of the husband and wife, on this reason is founded the text, *viz.*,—'Partition cannot take place between the husband and wife,' therefore it cannot but be admitted that upon extinction of the husband's right the extinction of the wife's right is necessary—(*G. C. Sarkar's Translation*, p. 165).

It was contended that it would be most unlikely that the Hindu Law, which so jealously guards against escheat as to interpose even strangers, such as the preceptor and the pupil, between the ordinary heirs and the Crown, should favour such hardship as the utter exclusion from inheritance of one whose husband was a joint owner of the estate. Now the recognition of the claims of the preceptor and the pupil is due, we think, not to any jealousy of the Hindu Law to the claim of the Crown, but to a deserved deference to the relation between pupil and preceptor. In the good old days of Hinduism when every twice born man had to live in the house of his preceptor as a member of his family during his studentship extending over a long series of years, that relation was almost as intimate and as sacred as that between father and son. And then as for the hardship of the case, it seems to be more imaginary than real. If, as it must be conceded, the appellant's claim has to be postponed in favor of the remotest *samanodaka* or *bandhu* who would practically be a stranger to her, there is no greater hardship in allowing escheat

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to the Crown from whose representatives she can well expect, and we hope will readily obtain, a much more liberal allowance for her maintenance with much less difficulty of realization than she could from a distant relation succeeding to the estate.

Upon all these grounds we think the judgment of the Court below is right and ought to be affirmed with costs.

T. A. P. *Appeal dismissed.*

PRIVY COUNCIL.

KRISTOROMONI DASI (PLAINTIFF) *v.* NARENDRO KRISHNA BAHADUR AND OTHERS (DEFENDANTS).

P. C.*
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November
6 & 24.

[On appeal from the High Court at Calcutta.]

Hindu Law, Will—Construction of Will—Successive interests bequeathed—Gift over after life interest—Construction of gift to persons, and the heirs male of their bodies.

A will cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mullick case*) (1); secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*) (2), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid.

A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

(1) *Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moore's I. A., 123.

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*, L. R.; I. A., Sup. Vol., 47; 9 B. L. R., 377.

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born), making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime.

Held, that the gift of the residue, so far as it purported to confer an estate of inheritance on the half-brothers, and the heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect: that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff: and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed.

APPEAL from a decree (16th December 1886) of a Division Bench of the High Court, in its Ordinary Original Civil Jurisdiction.

The question raised on this appeal was whether a bequest in the will of the late Raja Jadubindro Krishna Bahadur, deceased on the 22nd March 1852, had the effect of giving an absolute estate, or of giving an estate for life only, the testator's attempt to limit the succession to male issue of the donee failing, as contrary to Hindu law.

The appellant sued the representatives of the testator, who was her father, to have the will construed, and the rights of all parties declared under it. So much of the will, which was dated 5th March 1851, as is material appears in their Lordships' judgment.

The testator had two half-brothers who both survived him. He left no child but the plaintiff his daughter, who was married, but had no children, when her father died, and to whom afterwards six sons, parties to this suit, were born. The deceased half-brother, Nripendro Krishna, had no son when the testator died, but two sons were born to him afterwards, *viz.*, the second and third defendants, Nil Krishna and Benoy Krishna. Narendro, the surviving half-brother, the first defendant in this suit, had three sons at the testator's death (one of them since deceased leaving a childless widow), and four sons born after the testator's death.

The plaintiff's contention was that, on the death of the half-brother Nripendro Krishna, which occurred on the 19th Novem-

ber 1885, as to all the moiety of the residue of the testator's estate to which Nripendro had been entitled, the trusts and limitations of the will, so far as they were legally capable of being carried out, had been satisfied and ended; and that the plaintiff, as the testator's only child, had then become entitled to that moiety, for the estate of a daughter, by the Hindu law of inheritance. This was claimed as additional to her right under the will to receive for her life the income of the whole residue.

It was contended in the written statements, filed on behalf of the second and third defendants, the sons of Nripendro Krishna deceased, that the two half-brothers took under the will an absolute interest in the testator's estate, subject to the plaintiff's life estate, and subject also to be divested in case Nripendro Krishna and Narendro Krishna should die without leaving an "heir or heirs male of their or either of their body." The second and third defendants also contended that if it should be considered that the half-brothers did not take such an absolute estate, then they, having been in existence at the death of the testator, were the proper objects of the gift in the will, *viz.*, "to the heir or heirs male of their or either of their body."

The six sons of the appellant were in the same interest with her, contending that no such estate as the testator had sought to create could legally exist. Also they contended that assuming gifts of life estates to the half-brothers with remainders to those who might answer the description of heirs male of the body, this was a gift to a class of which some members might not be capable of taking, and it was therefore void. They claimed as heirs of the testator in remainder, immediately after the death of their mother, of all the estate not validly disposed of by the will.

The first of these contentions was allowed by the judgment of the High Court (PETHERAM, C.J., and MACPHERSON, J.) delivered by PETHERAM, C.J.

This judgment stated that the claim of the plaintiff was that the gift of estate to her two uncles was more limited in its nature than the general law of succession would confer, and that the limiting the descent in their male line only was to attempt to create an estate repugnant to Hindu law, the latter being therefore null and void.

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The judgment proceeded thus :—

"The rule of law, as established by the *Tagore case* (1) appears to be that, inasmuch as you cannot give an estate or any interest in it to a person not in existence at the death of the testator, you must give the entire estate with all its ordinary incidents of devolution to the person to whom it is to be given, because anything which is less than that limits his power of disposal over the estate, and therefore gives an interest to some particular line of succession that comes after him to the exclusion of others. This appears to be the rule, and it is said to apply to this case because the words 'to the heir or heirs male of their or either of their body,' which immediately follow the devise to the two half-brothers, are words of limitation, and that such a disposition was an attempt to create in perpetuity an estate in violation of the rule of succession according to Hindu law, somewhat similar to an estate tail, by which this property would devolve from generation to generation in the male line to the exclusion of all females ; and as that was not a gift of the entire estate to the first devisee, the devise beyond the interest of the first devisee must be limited by the ruling in the *Tagore case* to the life interest coming thereafter, and that consequently, one of the brothers who had no sons at the time of the testator's death, having died, there was an intestacy as to one moiety of the estate, and that the plaintiff is entitled to a decree as to that.

"Now, as I said before, the first question for us to consider is, whether that is the meaning of the testator, whether that is the meaning to be collected from the whole of the will. Having regard to the whole of the will, it seems to us that the testator's intention, when he made this will, was that in the event of his two half-brothers (or either of them) living at the time of his death, having male issue, the estate should go to them in equal moieties, but in the event of either of them dying, with reference to their issue, in the same condition that the testator was, that is to say, leaving no son, his own daughter should take the estate in preference to the daughters or widow of his half-brothers ; but all words, so far as we can ascertain, indicate that his intention was, that the estate, when vested in his half-brothers, should be an absolute estate and all that he had to give ; but that in the event of their not having any sons at the time of their death the estate should revert to the son or sons of his daughter, and that they should take the same estate as the testator's half-brothers would have taken in the first instance.

"Let us examine what the words are from which we come to that conclusion. It is necessary that there should be a verbal criticism of the language employed. The first devise is the devise of the income to the daughter, and as to that, as I have said before, there is no dispute ; and then comes a direction to the trustees, that upon the death of the daughter

(1) L. R., I. A., Sup. Vol., 47, 9 B. L. R., 377.

they are to pay over any cash that there may be in existence, and assign and convey the residue of the estate to his two half-brothers. It seems to us that the very use of the word 'pay' indicates that the intention of the testator was that the interest which the brothers were to take with the property so handed over to them was the entire interest in the property at the time. The fact of the trustees handing over the cash, and conveying the estate to the half-brothers of the testator is inconsistent with their handing over any thing else than the whole estate; and therefore the use of the words, 'to the heir or heirs male of their or either of their body,' is inconsistent with that view, if it has a tendency to limit that estate in any way.

"But when one comes to examine these words closely, so far from their being inconsistent with, they rather support that view of the meaning of the other words, and for this reason. As I said before, the property is to be paid and conveyed absolutely to the persons who may be found entitled to it by the first words of this clause, and it appears that the persons who, if they were living, were to be the recipients of the estate, were the two half-brothers of the testator, and then come the words 'to the heir or heirs male of their or either of their body,' but there are after these words no words of limitation or exclusion; therefore, it appears to be pretty clear that the estate which was under any circumstances to be conveyed to the sons of the two half-brothers was to be an absolute estate, because, as I said just now, there is no attempt to limit it in any way. This shows that the intention was that whenever this estate was conveyed from his own trustees to his half-brothers who might be alive, or to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them.

"Then the question arises what effect ought to be given to the words which follow the word 'body,' 'in failure of which in trust to give the same to the son or sons of my said daughter,' and whether if we attempt to give effect to them by giving effect to the view which we have formed of the general meaning of this devise, we shall contravene any rule of law.

"As I said before, the meaning of the first clause in our opinion is, that this estate is, upon the death of the daughter, to be given absolutely to these two half-brothers of the testator, subject to anything that comes after. It appears from the *Tagore case*, as I said just now, that if that is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1), and other cases besides, that although, according to Hindu law, it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty

(1) I. L. R., 4 Calc., 23; L. R., 5 I. A., 138.

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may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

"Under these circumstances, it seems to us that this will may be read as carrying out what we consider to be the true intentions of the testator; which, as I have before said, we think was, that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them, if dead, should take the fee of this property, but that in the event of their having no male descendants at the time of their death, the estate should be divested, and go over to the son or sons of his daughter; and that we think can be carried out on the law as laid down in the case of *Bhoobun Mohini Debi* without prejudice to any rule of Hindu law.

On this appeal,—

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* (Sir *Horace Davey, Q.C.*, with them) appeared for the appellant.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. Pitt-Kennedy*, for the six sons of the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne*, for the respondents, Nil Krishna and Benoy Krishna.

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* for the appellant, submitted that the judgment of the High Court did not give due weight to the manifest intention of the testator to exclude in every event females from the line of succession, as shown, not only by the words "heir or heirs male of their" (*i.e.*, his half-brothers') "or either of their body," but also by the words which followed, *viz.*, "in failure of which in trust to give the same to the son or sons of my daughter." These bequests were made with the intention of impressing on the testator's estate a mode of devolution declared in the judgment in the *Tagore case* (1) to be contrary to Hindu law, and therefore void. It was not the intention of the testator to give to his half-brothers an absolute estate subject to defeasance in the event of they or either of them dying without leaving male issue; but he intended to give them estates which should descend to their heirs male only, excluding the female line. The estate of inheritance, then, which the testator tried to create, was inconsistent with Hindu law, and the bequest could not take effect, at all events,

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.

for more than the lives of the half-brothers respectively. It would be contrary to the words of the will to make the estates of the half-brothers descend upon their heirs general, and a gift such as this, which was what in English law would be called an estate tail, must be cut down to a gift of a life estate, as it could not by any construction be expanded into a gift of the absolute estate,

They referred to the *Tagore case* (1) ; and *Tarakeshwar Roy* v. *Shoshi Shikareswar Roy* (2).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. Pitt-Kennedy* for the sons of the appellant, were in the same interests, maintaining the invalidity of the bequest to the heirs male, and asking for costs out of the estate.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne* contended that the High Court had been right in holding that the testator's half-brothers took an absolute estate defeasible only on their dying without male issue living at their deaths respectively. If effect were given to the construction for which the appellant contended, certain important words in the will would not receive their full force and meaning. Those words were directory, *viz.*, "to pay, assign, and convey," and showed that the trustees were to make over the *corpus* of the estate absolutely. Again, it was assumed, in the argument for the appellant, that the bequest, "and to the heirs male of their or either of their body," were words of limitation, and that the bequest was not one of purchase, to use a term of the English law, to the first taker. But to make this assumption was to introduce the rule in *Shelly's case* (3), a course most strongly to be deprecated in construing a Hindu will. The words "heirs male, &c.," were not words of limitation, and they should be struck out altogether ; with the result that the gifts were absolute in the first instance. This case was distinguishable from the *Tagore case* (1), in which the first estate was one for life ; it being here an estate to the half-brothers with a devise over to a class, *viz.*, those who might

(1) L. R., I. A., Sup. Vol., 47 ; 9 B. L. R., 377.
(2) L. R., 10 I. A., 51 ; I. L. R., 9 Calc., 952.
(3) 1 Co. 96-a.

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answer the description of the heirs of their body. The latter words did not qualify the estate given to the father, which was an absolute one when taken apart from the void limitation which followed it. *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (1) supported the respondents' case. The estate created in the half-brother was no unusual one, and that estate should receive effect by the will being re-moulded in accordance with the testator's views. They referred also to *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (2), and *Baker* v. *Tucker* (3).

Mr. *J. Graham, Q.C.*, replied.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The question in this case arises from a rather obscure passage in the will of Raja Jadubindro Krishna, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half-brothers Rajas Nripendro Krishna Bahadur and Narendro Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated 25th March 1851. The testator died in 1852. His daughter, who was his only child, is the plaintiff and appellant in this suit. She has six sons, all born after the testator's death His brothers both survived him. One of them, Nripendro, has died, leaving only two sons, both born after the testator's death. The other, Narendro, is living. He had three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The defendants and respondents in this suit are Narendro, the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of Nripendro, who are also his executors; and the six sons of the

(1) L. R., 10 I. A., 51; I. L. R., 9 Calc., 942.
(2) I. L. R., 4 Calc., 23; L. R., 5 I. A., 138.
3 H. L. C., 106.

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plaintiff. Every person therefore who could possibly claim an interest under the residuary gift is a party to the suit.

The plaintiff contends that the residuary gift is invalid, except so far as it confers life interests on herself and her uncles, and that on the death of Nripendro the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, *viz.*, in each case, the death of the brother without leaving male heirs of his body then living. The High Court have adopted the latter view of the case, and have dismissed the suit. From their decree this appeal is brought.

The view of the High Court has been supported by the Counsel for the respondents, the brothers' families, who expressly stated that their argument, though endeavouring to amplify and illustrate the High Court's view, must be taken as not departing from it. The High Court considered that the true intention of the testator was "that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them if dead, should take the fee of this property; but that in the event of their having no such descendants at the time of their death, the estate should be divested and go over to the son or sons of his daughter."

This conclusion is rested, first, on the direction to the trustees to "pay, assign, and convey," which, it is said, shows that the whole estate is to be dealt with; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression "heir or heirs male of his or their body;" and, thirdly, on a view of the law which is stated thus:—

"It appears from the *Tagore case* (1) as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (2) and other cases besides, that although according to Hindu law it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.
(2) I L. R., 4 Calc., 23; L. R., 5 I. A., 138.

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entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on a contingency, but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to these rules. It is important to have them accurately stated. And their Lordships find that the statement of the High Court requires some qualifications.

The *Tagore case* decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick case* (1); and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore case*.

The *case of Bhoobun Mohini* conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, "No other heir shall be entitled." This was held to mean that, if Kasiswari

(1) *Soorjeemoney Dossee* v. *Denobundhoo Mullick*, 9 Moore's I. A., 123.

died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter.

Upon the construction of this will, their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the period for which the trust continues; it is on her death that the trustees are to pay, assign, and convey; and the question is, to whom? The payment, &c., is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression "pay, assign and convey" is important to show as much as that, but their Lordships do not enter upon any discussion, such as has taken place in England, as to the effect of such words upon the nature of the gift over. They treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words "heirs male" be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator.

The latter of these two alternatives can only be reached by reading the word "and" as if it was "or." Indeed one

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passage of the judgment looks as if this construction was in the minds of the learned Judges. They point out that no words of limitation are attached to the words "heirs, &c." And they add, "This shows that the intention was that whenever the estate was conveyed from his own trustees to his half-brothers who might be alive, *or* to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them." This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general, or it might be to the alienees, not to the male descendants.

The absence of words of limitation after the words "heirs, &c.," does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the appellant's than the respondents' construction, because if "heirs, &c.," are themselves words of limitation, words of limitation attached to them would be inappropriate, otherwise they would be appropriate, and they would tend to show that the "heirs" were objects of direct gift.

But upon putting it to Mr. Rigby whether he claimed to read the word "and" in a disjunctive sense, he at once disclaimed any such contention; and, indeed, it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the respondents.

Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is composed in English; the draftsman seems to have had a smattering of English real property law; he clearly knew there was a difference between a son and an heir male of the body; and apparently he had English dispositions of property in his eye. This seems to be an attempt of a kind not infrequent among Bengal zemindars of late years to introduce English estates tail into Hindu property which the law will not allow. At all events their Lordships must construe the words in their plain and obvious sense; and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling

an English estate in tail male. That cannot take effect. But the testator intended to benefit his brothers personally; and his gift to them and their heirs male would, if valid, have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (1).

Whether the words which introduce the gift over, "in failure of which," import a general failure of the brothers' issue, is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remainder after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails, because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effecting the actual intention of the testator. But if this testator intended not to give an absolute interest, which their Lordships hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordships would not be justified in taking any such liberty with the will.

The plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lord-

(1) L. R., 10 I. A., 51; I. L. R., 9 Calc., 952.

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ships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of the portion discharged there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half-brothers and the heirs male of their bodies, is contrary to law and is void; that in the events which have happened the gift to the sons of the plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half-brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the plaintiff; and that, on the death of Raja Nripendro Krishna Bahadur, the inheritance of his moiety devolved on the plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled in possession to one moiety of the residue. The High Court should place her in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who, by a reasonable construction, could claim them. The suit, or some like suit, was absolutely necessary, and it is not too extensively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree therefore should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal.

They will humbly advise Her Majesty in accordance with this opinion.

Appeal allowed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondents, the Coomars—Nilkrishna and Benoy Krishna: Messrs. *Lawford, Waterhouse & Lawford.*

Solicitors for the respondents, the Mittras (sons of the appellant): Messrs. *Watkins & Lattey.*

C. B.

SHANKAR BAKSH (DEFENDANT) *v.* HARDEO BAKSH AND OTHERS (PLAINTIFFS.)

P. C.* 1888 *Nov.* 13, 14 *and* 15.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Partition—Inheritance of talukdari estate in Oudh—Sanad recognizing primogeniture, Effect of as to existing rights of inheritance —Shares held by members of family—Mesne profits on specific and definite shares.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition.

A talukdari estate which, before and after annexation, was subject to the common Hindu law of Oudh, *viz.*, the Mitakshara, was restored, after the general confiscation of 1858, to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards, in 1861, was issued a primogeniture sanad of the above talukdari estate. This sanad could not prevail against the family rights of inheritance; and effect was given to family arrangements, with the same result as regards the two villages.

On the contention that the family, by the effect of the sanads, was to have one head and sole manager in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture: *Held*, that this kind of managership was entirely unknown to the common Hindu law of Oudh; and that, apparently, the Oudh Estates Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was, accordingly, decreed to the members of the family suing for it.

Pirthi Pal Singh v. *Jawahir Singh* (1), as to the right to partition of a talukdari estate, referred to and followed: also, the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, and MR. STEPHEN WOULFE FLANAGAN.

(1) L. R., 14 I. A., 37; I. L. R., 14 Calc., 493.

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APPEAL from a decree (12th March 1883) of the Judicial Commissioner, confirming, after a remand (27th April 1882), a decree (17th April 1881) of the District Judge of Sitapur.

The plaintiffs in the suit out of which this appeal arose, Hardeo Baksh, Jagan Nath Singh, and Ganga Baksh, sued for separate possession of their several shares, upon partition of family talukdari estate, together with their shares of profits therein for the Fasli year 1288; claiming also their shares in the other property of the family.

The defendant, Shankar Baksh, denied their right to partition, alleging that they were entitled only to maintenance out of the profits of the talukdari estate, which he claimed as inherited by himself, according to the rule of primogeniture; the latter having been, as he alleged, established by sanad in regard to the taluk.

The principal question, on the whole case, having been whether the talukdari estate descended to the eldest son alone, or was subject to division into shares, in the course of this appeal, the defence on which reliance was mainly placed, on behalf of the appellant Shankar Baksh, was that, notwithstanding that there was participation between the members of the family in the profits, or a beneficial interest in the talukdari estate to that extent, their rights went no further, and that by the effect of the primogeniture sanad, the eldest son was entitled to be sole talukdar, having the management of the estate in his hands, subject to the trusts for the benefit of the other members.

On the annexation in 1856, a talukdari estate, Rampur Kalan, in the Sitapur District, was settled with Anant Singh, Balwant Singh, Hardeo Baksh, the three sons, and with Jagan Nath Singh, the grandson of Dariao Singh, a Kanungo in Oudh. After the Mutiny settlement was made with, and a sanad dated 25th October 1859 was granted to, the same four persons. At the same time separate sanads were given to Dariao Singh as sole talukdar of the separate villages of Saraiyan and Piprawan, which, out of confiscated lands not restored to the previous owner, were granted to him as a reward for his services.

In 1861, Dariao, having received the circular regarding the descent of taluks to one talukdar, replied that the taluk

Rampur Kalan was held by the family in shares, also recognized by the sanad of 1859, and that there was no occasion for a new one. The primogeniture sanad, to which the present question related, was however sent to and retained by him.

On the 2nd September 1867 he died; and, in the following December, mutation in the revenue register was made in the names of the four persons above-named.

At the regular settlement, the shares of the brothers were recorded thus: Anant Singh, 6 annns; Balwant Singh, 5 annas; Hardeo Baksh, 5 annas.

On 3rd November 1871, Balwant, the second son, died; and mutation of name was made in favor of his two sons, Jagan Nath and Ganga Baksh, on the application of Anant Singh, their uncle.

In the official list of talukdars down to 1878, the names of all the sons and grandsons of Dariao were mentioned. Anant Singh, the eldest son, died on 11th October 1879; the name of Shankar Baksh, his son, being entered in his place and the amount of his share being recorded as 6 annas.

In or about 1880, differences arose between Shankar Baksh on the one side and Hardeo Baksh and Jagan Nath on the other, in regard to the question of the rule of inheritance in the talukdari, with the result, after other litigation, that the present suit was instituted.

The District Judge found that the property was ancestral, save the two villages acquired by Dariao, and a small part consisting of purchases by the family: also that the whole was held by the members of the family in specified shares. He referred to the cases of *Hardeo Baksh* v. *Jawahir Singh* (1), adding that, apart from the admissions of Dariao Singh, and his son Anant Singh, "as to the rights of the plaintiffs, their names are entered in the khewats as recorded proprietors, and these papers have been attested both by Dariao and Anant Singh, and upon that point there is and cannot exist any dispute. The plaintiffs, moreover, are in possession up to the present date. They are in the enjoyment of the usufruct according to their respective shares in the estate, and their status as such has never been once disputed, except by the present defendant."

(1) L. R., 4 I. A., 178; I. L. R., 3 Calc., 522.

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His judgment also stated the following :—

"A Commissioner was appointed under the provision of s. 392, Act X of 1877, to make a local investigation as to the exact value of the moveable property appertaining to the estate as well as the profits due to the plaintiffs as recorded proprietors according to the shares so recorded. As, however, the defendant admitted that the profits claimed by the plaintiffs were correct, there was no need for further enquiry upon that point, and the Commissioner's enquiry was therefore limited to the moveable property of the estate. The Commissioner's report upon that question is full and satisfactory, and as no objections have been raised to that report, the finding of the Commissioner will be accepted as correct and binding upon the parties to the suit."

The District Judge's decree was "for the plaintiffs to the extent of a 10-anna share in the entire estate, Rs. 88,182; moveable property of the estate Rs. 20,797 as profits, and Rs. 12,065 debts due to the estate. The partition will be made by the Collector under s. 265 of Act X of 1877."

On the defendant's appeal, the suit was remanded, under s. 562, Civil Procedure Code, by the Judicial Commissioner, for the evidence of some witnesses tendered, but not examined. The result was the same decree. The Judicial Commissioner upheld it, in a judgment of which the material part was as follows :—

"I agree with the District Judge that the fact that a primogeniture sanad was granted to Dariao Singh cannot deprive his younger sons of rights which were acknowledged before the grant of that sanad, and were admitted and recorded in the settlement papers after the grant of that sanad.

"All the evidence tends to show that, though the members of the family had agreed as to the manner in which the property should be divided if a separation should take place, they continued to live as a joint family. Had Hardeo Baksh, for instance, had no share in the estate, villages would not have been purchased in his name from the profits of the estate. But the main contention is that, after the declaration of definite and certain shares, the joint family could no longer exist : such a declaration being incompatible with the status of a united family.

"It appears to me that the intention of the parties must be looked to. In the settlement records the share of each brother was recorded, but no separation ever took place. The members of the family continued to

live together, there was no division of profits, there was nothing in fact to show that any separation of right or of property took place or was intended to take place. The family having recorded that the share of the elder branch should be 6 annas and the shares of the younger branches 5 annas each continued to live in union. The arrangement could not come into effect till the family separated. Acting on this arrangement the plaintiffs, respondents, have now sued for their share as representatives of the two younger branches, not for their legal shares as three members of an undivided Hindu family.

"I am of opinion that, though the share which each branch should eventually have was defined, anything like an actual separation of right or of property was indefinitely postponed, and that the family still remained joint and undivided.

"The last objection is that, though there is not a title of evidence of appellant having any moveable property in his possession, the lower Court has decreed Rs. 88,182-5-6 on this account,—and that the law did not authorize the Judge to delegate his function by appointing a Commissioner to value the property.

"It appears that on the 5th July 1881, the District Judge appointed a Commissioner under s. 392 of the Civil Procedure Code, to ascertain the value of the moveable property referred to in the 12th issue, which was "what is the nature and value of the moveable property in the whole estate." The defendant's agent attended the Commissioner; it has not been brought to my notice that the defendant made any objection to the appointment; it was not made a ground of appeal in the first appeal, and I do not see that the appointment was contrary to s. 392 of the Code of Civil Procedure, which empowers the Court to issue a Commission "for the purpose of.....ascertaining the market value of any property." The Commissioner has given full details of the property, and no objection has been taken to the items. I disallow the general objection and uphold the District Judge's finding regarding the amount to which the plaintiffs-respondents are entitled as their share of the moveable property."

On the 8th September 1883, a certificate under s. 600 of the Civil Procedure Code (Act XIV of 1882) was granted by the Judicial Commissioner. On the 13th June 1884, the appellant applied to withdraw his appeal, and to have back the security bond and costs deposited by him; and an order was made to that effect, striking the application for leave to appeal off the file.

On the 16th June 1884, the appellant applied to the Judicial Commissioner for leave to proceed, notwithstanding the above, and the respondents were called upon to show cause why this

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application should not be granted. They urged that the case having been struck off, the case was not then within the competency of the Court to deal with.

On the 28th July 1884, the Judicial Commissioner made an order in the applicant's favor, giving his reasons. They were that a ruling of the Full Bench of the High Court, Calcutta, in *Radha Binode Misser* v. *Kripa Moyee Debia* (1), laid down that "the High Court has the power, and ought to exercise its discretion in each particular case with regard to restoring appeals to the Privy Council, dismissed for default, or removed, for any reason, from the file of the Court." He concluded that under the circumstances, and considering that no harm had been caused to the respondents by the action of the applicant, he ought to accede to his request, on the condition of his paying the respondent's costs of the application, and he directed that the appeal be re-admitted upon the register, and proceed.

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon* for the respondents.

Objection was taken for the respondents to the hearing of the appeal, on the ground that it had not been duly admitted. The Judicial Commissioner had no authority under the Code of Civil Procedure to make his order of the 28th July 1884. The only course for the appellant at that time was to apply for special leave to appeal.

LORD HOBHOUSE said that Counsel for the respondents would be at liberty to make this objection part of their argument, if they should think proper so to do, after the case for the appellant had been heard.

Mr. *R. V. Doyne*, for the appellant, contended that the sanad of the 11th October 1860 was effective to show the introduction of the rule of primogeniture.

The rights of the respondents, regard being had to the terms of the sanad, and to the family declarations and admissions, were to obtain their proportionate shares of the profits or income of the talukdari estate. It was not shown that, by arrangement

(1) 7 W. R., 531; B. L. R., Sup. Vol., 730.

contrary to the terms of the sanad, the members of the family had a right to partition. They might, it was not disputed, take their shares of the profits; but they had no right to break up the taluk. The conduct of the parties pointed to this course, that while the senior member of the family managed the estate, the junior members received their proportion of the profits, as separate interests of their own; and it had been repeatedly decided that a talukdar might be held a trustee; trusts obliging him to hold in some cases on behalf of others interested in the estate. There was no surrender or waiver of the primogeniture sanad, yet it was admitted that the talukdar was bound to give, not only maintenance, but a specific share of the profits to his younger brothers and their sons. The succession to the talukdari estate was governed by the rule of primogeniture, the talukdar having the perpetual right of management, and he alone being invested with that title. He referred to *Hurdeo Baksh* v. *Jawahir Singh* (1), *Hardeo Baksh* v. *Jawahir Singh* (2), *Widow of Shanker Sahai* v. *Kashi Persad* (3), *Pirthi Pal Singh* v. *Jawahir Singh* (4).

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon*, for the respondents, were called upon only as to the question whether mesne profits should be allowed. They were also heard as to the readmission of this appeal on 28th July 1884. They referred to s. 599, Civil Procedure Code, arguing that the Judicial Commissioner had no other power than such as was given in Chapter XLV, Civil Procedure Code, and could not review the order of 13th June 1884. *Radha Binode Misser* v. *Kripa Moyee Debia* (5) was referred to.

LORD HOBHOUSE said that the Judicial Commissioner could bring the appeal on to the file again.

On the question as to the right to mesne profits, it was maintained that the right of the respondents to receive profits had not been questioned. The appellant had made collections,

(1) L. R., 4 I. A., 178; I. L. R., 3 Calc., 522.
(2) L. R., 6 I. A., 161.
(3) L. R., 4 I. A., 198; L. R., Sup. Vol., 220.
(4) L. R., 14 I. A., 37; I. L. R., 14 Calc., 493.
(5) 7 W. R., 531; B. L. R., Sup. Vol., 730.

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and it was on their specific and admitted shares, as regards the profits, that the respondents had been entitled to them. There was an admission as to this spoken of in the judgment of the District Judge.

Mr. *R. V. Doyne*, in reply, said that as long as the family remained joint, the statement of an account could not have been called for. He referred to the finding of the District Judge that the plaintiffs had continued to enjoy the profits of the estate, according to their specific shares, down to the date of the judgment.

Their Lordships' judgment, at the end of the arguments of Counsel, was delivered by

LORD HOBHOUSE.—The principal question raised in this case is whether certain estates which belonged to Dariao Singh, talukdar of Rampur Kalan, go according to the law of primogeniture, or are subject to a family arrangement by which they were divided into shares? The principal estate is known by the collective name of Rampur Kalan. It was an estate which was subject to the common Hindu law of Oudh—the Mitakshara law. It was confiscated with other Oudh estates, and it was restored to the family by sanads. The only material difficulty that exists in the case is owing to the circumstance that two different sanads were granted for the purpose of the restoration: one recognising a division into shares, and the other establishing primogeniture.

Their Lordships have not to deal with the difficult question which has been agitated in so many cases here, whether, to use rather a popular than a legal term, equities shall prevail against the form of the sanad; because, although it was maintained in the Courts below that the primogeniture sanad was to prevail against all inferences to be drawn from the transactions among the family, yet that position has been abandoned now, and Mr. Doyne has very candidly stated that he cannot resist the conclusion that, as regards the beneficial interest in the profits, there must be participation between the members of the family. But what he maintains is that the arrangements led to this inference, that the family was still to have a sole head to it, and that he would take the title of talukdar and have the

management of the property, and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate; and that they could not displace the head of the family from that position.

It is extremely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership, or headship, which could never be displaced or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the common Hindu law of Oudh. Nor is any such thing apparently contemplated by the Oudh Estates Act. Their Lordships do not pronounce an opinion here whether it could legally exist; but assuming that it could, there must be some very clear arrangements between the parties to prove its existence.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. In the last case of *Hardeo Baksh* that of *Pirthi Pal Singh* v. *Jawahir Singh* (1) in the 14th volume of Indian Appeals, very much the same sort of contention was set up. Let us take the statement of the defendant's contention—he was the head of the family—from page 60 of the report. Jawahir Singh prayed a declaration that he was entitled to hold the property "as an integral, impartible, and indivisible estate or taluka subject to the beneficial interest of the defendant in respect of the profits thereof to the extent of his share as declared by the Court." Sir Richard Couch delivered the judgment of the Committee, and observes that Jawahir Singh did hold the estates in "trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee he is bound to allow the partition to be made."

Their Lordships then ask what is the evidence in this case to show that there was an agreement between the members of the family that the head of the family should continue to hold the estate as an entire estate, and hand over the profits? To answer that question it is necessary to touch upon the heads of the case; but owing to the position the argument has assumed,

(1) L. R., 14 I. A., 37; I. L. R., 14 Calc., 493.

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it will not be necessary to go with great particularity into the documents.

It appears that in 1856 a temporary settlement was made, which, by the desire of Dariao Singh, the then head of the family, was in the names of his three sons—Anant, Bulwant, and Hardeo, and a grandson, who was a son of Bulwant. Bulwant and the grandson took one share between them, and the grandson's name may be left out of our consideration. The estate was settled in definite shares, nearly equal, but giving a slight preference of three pies to Anant, the eldest son.

It next appears that a sanad, of which we have no copy, was issued on the 25th of October 1859, in the terms of that temporary settlement. In December 1860 came the circular that was issued to the Oudh talukdars, calling upon them to elect whether they would take their sanads according to the common law of the Mitakshara or according to the law of primogeniture. It is impossible to read that circular without seeing that the officials then were desirous that the talukdars should choose the primogeniture sanads. To that circular Dariao made a reply to this effect: "That at the time of the settlement of 1264 Fusli, in order to avoid future dispute, and according to the custom prevailing in his family, he caused a kabuliat to be executed;" and then he states that it was executed in the manner which has been mentioned, "The sanad, dated 25th October 1859, has been granted by the Chief Commissioner according to the above terms. The petitioner has now no occasion to apply for a fresh sanad, because the aforesaid sanad is enough for them." Therefore he distinctly elects to take a sanad which recognises the co-sharing of all his sons. That election of his is the more pointed because there were two other villages, not then part of Rampur Kalan, though they have since become part, Saraiyan and Piprawan. Those were granted by Government to Dariao Singh in consideration of loyalty; and as to those he prays that "Saraiyan and Piprawan be after the petitioner's death in the name of Anant Singh, the eldest son, in addition to the 5½ annas shares out of taluka Rampur Kalan." Dariao Singh knew perfectly what he was about, and he elects that as to Rampur

Kalan it shall go in shares, and as to the two other villages they shall go according to primogeniture.

It is a very strange thing that in answer to that request of Dariao Singh, the officials should have sent him a primogeniture sanad; but they did so. It was dated, strange to say, before the date of Dariao's answer. Dariao's answer was on the 29th of January 1861; and the sanad is dated on the 11th of October 1860. It was cut-and-dried ready to issue. When precisely it was received by him does not appear, but it was some time between the 13th of December 1860 and the 14th of April 1863. No remark was made upon it. Whether he did not observe that the wrong sanad had been sent to him, or whether he did what is so exceedingly common for Indian gentlemen to do, thought it was best not to be offensive, and to comply with the wish of the Sircar, we do not know. In point of fact no remark was made upon the sanad at that time.

Only one event took place, between Dariao's death and the receipt of the sanad, having any bearing on the question, and that is, that Dariao personally accepted and agreed to pay the Government jumma, and it would seem that his name was entered in the Collector's books as the talukdar.

Nothing further occurred until the 2nd September 1867, when Dariao died; and then came the necessity for a mutation of names; and what took place upon that occasion is, as their Lordships think, the most important feature in the whole case. It is very unfortunate that these documents have been tossed together in a way that makes it difficult to disentangle the proceedings. It will be best to take the case of Saraiyan first.

On the 13th of November 1867, the tahsildar of the district made a statement regarding the death of Dariao, "lambardar of village Saraiyan," and, after showing that his heirs were his three sons, he names as the heir able to become lambardar Anant Singh, that is the eldest son. Then he enters a remark "Dariao Singh, lambardar, has left three young sons, Anant Singh, the eldest son of the deceased is able to become a lambardar;" and he states that, subject to notice, Anant

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Singh's name deserves entry in the register. But Anant Singh was not willing to accept that position, and he presents a petition. In that petition he says that "there has been unanimity without 'any feeling of estrangement' between him and his brothers, and he prays that their names may be entered along with his in the column 'Name of Lambardar.'"

It is difficult to trace the exact proceedings further in respect of Saraiyan; but it is clear that in the result Saraiyan, though clearly granted in primogeniture, was entered in the four names of the three sons and the one grandson.

Turning to Rampur Kalan, we again find that Anant Singh was not desirous of appearing as the sole talukdar. He was called upon to present a fatehnama for mutation of names on his father's death. He sends one as to Saraiyan, and excuses himself as to Rampur Kalan. The three brothers present a petition on the 7th of April 1868, saying, "that the kabuliat of ilaka Rampur Kalan has stood in the name of the petitioners, and a sanad has also been granted in their names, such being the case a fatehnama should not be called for in respect of Rampur Kalan," meaning that no alteration of name was necessary. A fatehnama, however, appears to have been insisted on, and one is sent on the 11th April, but with a protest in the shape of a deposition by Anant. He there states that his father's name was entered as proprietor for Saraiyan only, but since 1264 Fusli "my name and the names of Bulwant Singh and Hardeo Baksh, my brothers, have been entered in the column 'Name of Proprietor,' in respect of the rest of taluka Rampur Kalan. The deceased's name was not there; moreover, the Government has granted a sanad in the name of us three brothers." Then he adds his desire that, "the names of the three brothers be also entered in the column 'Name of Lambardar.' Since 1264 Fusli the names of us three brothers have been entered in respect of all the villages of taluka Rampur Kalan which are situated in Tahsil Biswan; and our names were also entered in respect of certain other villages, but as Dariao Singh, my father, used to remain with the Settlement Officer, and was my superior, therefore at the time of assessment of the present settlement jumma his name was entered in respect of these villages; I now

desire that jointly with my name the names of Bulwant Singh and Hardeo Baksh my brothers be entered as before in equal shares in these villages also;" a most distinct return to the state of things which existed before this primogeniture sanad was sent wrongly to Dariao Singh, and his name was entered in the Collector's book.

The proceedings seem to have occupied a considerable time. No order was made until the 29th of April 1869, when an order was issued in this form by the Deputy Commissioner: "The case is before me for an order as to mutation of names. There is no one to dispute the title of these sons. The hitch, if any, is the fact that Jagan Nath (Bulwant Singh's son) is entered in the Malguzari Register: it must remain there." He was an infant at that time. "Mutation of names is to be in the name of all four: Anant Singh; Bulwant Singh; Hardeo Baksh, and Jagan Nath."

The same sort of proceedings took place in respect of Piprawan, but it is not necessary to follow them out with the same particularity. The result is summed up by the Deputy Commissioner in the year 1841 in a judgment which he delivered on an application for partition, which is quoted in the District Judge's judgment in this case. He says: "In the khewats prepared at regular settlement the shares in the whole ilaka, and also in the grant, were defined as follows: Anant Singh six annas, and the other two sons five annas each. These shares are slightly different from what was stated by Dariao Singh in his letter of 19th January 1861." That was in answer to the circular about the sanads. "By this new arrangement the eldest son, Anant Singh, gave up his exclusive right to two mauzas, and he was recorded as proprietor of a 6-anna share in the whole estate instead of a 5½-anna share in part of it. The khewats were signed by Anant Singh with his own hand."

That was the result. These proceedings show exactly the footing on which the family stood. It is not a question whether Anant Singh made a conveyance to his brothers; though if that had been the question there might be reason to maintain the affirmative. As to Piprawan and Saraiyan, he did most distinctly make a conveyance because those were granted according to the

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law of primogeniture. He took a consideration for it by receiving a larger share in the whole estate. But the value of the proceedings is to show that from 1856 onwards the estate had been treated, notwithstanding the issue of the primogeniture sanad, as an estate which was held in the shares designated in Dariao's letter.

There are many other things in this record which show the same condition of the family, but their Lordships think it not necessary to refer to them, because what has been stated is quite sufficient. But some notice must be taken of those things which, according to the contention of the appellant, would lead to the contrary inference. Mr. Doyne, in his argument, referred to three circumstances. One was that Anant Singh has rested his title not entirely on the earlier sanad, but on both sanads. Another is that in the lists of talukdars that were made out, Dariao Singh's name was entered in respect of Rampur Kalan, in list No. 3, which is one of the primogeniture lists. Another is that in the wajib-ul-arz, which seems to have been framed either under the signatures, or with the assent of, the three brothers, they claim that the succession is to go according to s. 22 of the Oudh Estates Act, which relates to the primogeniture estates.

With respect to the reliance on the two sanads, that is contained in a statement which is called a petition; but it is a statement of Anant Singh's, made on the 9th of July 1868, in the course of the proceedings for mutation of names. All he says is this: he mentions the earlier sanad and then he says that, "a fresh sanad in English and Persian in the name of the petitioner's father (deceased) has been granted as an additional favor, so the taking effect of both the sanads is the cause of further stabilty of the (ilaka) estate." He then goes on to reiterate the case for partition: "From 1263 Fusli up to 1266 Fusli, and up to this day, the settlement of ilaka Rampur Kalan has been in the name of the petitioner, Bulwant Singh, Hardeo Bakhsh, and of Jagan Nath Singh, son of Bulwant Singh, and in the registers of the Collector's Court and of the tahsils, the above-mentioned names are entered all along; such being the case under the rule laid down in the directions of the revenue officers, mutation of names should be

effected without any alteration in the names entered as proprietors." That is the occasion on which he mentions both sanads. But on the very same occasion he also states that the estate is held in co-parcenary according to the family arrangement, and there is not the least appearance upon the face of this document that Anant Singh was considering that there was any conflict between the primogeniture sanad and the co-sharing of the estate between the family, or that he intended for a moment to set up any claim under the primogeniture sanad which was in contravention of the family arrangement.

In March 1869 the sanads were called for, and were sent in for the purpose of preparing the lists. On that occasion, in a petition signed by the three brothers, they prayed that, under Rule No. 3 "our names may be entered in list No. 3;" and the order made by the Deputy Commissioner was: "Enter names in the list." That order was made on the 10th of March 1869. Again we find what one must characterise as a most extraordinary proceeding. Instead of entering the names in the list No. 3, as prayed, the name of Dariao, then dead, was entered in the list No. 3, so that, according to the effect of that list, the estate would go by the rule of primogeniture, and go to Anant alone instead of being divided among the three. It does not appear that any explanation was given to these gentlemen, that any questions were asked of them, that it was pointed out to them that there was an inconsistency between the entry in list No. 3 and the desire to keep the estate in the three names; but there seems to have been, without any further communication, a simple entry of Dariao's name in the list. It is impossible for their Lordships to attach importance to such a proceeding as that.

The third document relied on is the wajib-ul-arz, which was framed on the 1st January 1870; and there, no doubt, occurs a passage that "as the proprietors are talukdars, succession will be regulated by s. 22, Act I of 1869." Well, that is a matter of law, on which they were not very competent to speak; but on the matters of fact, on which they are the most competent of all men in the world to speak, they have no doubt whatever as to what the state of the family was. They state: "From the death of Dariao Singh, the sons, the present taluk-

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dars, have continued in possession of the taluk;" and then lower down they say: "This village"—that is Rampur Kalan, the whole estate,—"is in the possession of talukdars as a joint zemindary; the shares being as follows;" a table shows the shares: Anant Singh six annas; Bulwant and Jagan Nath five annas; Hardeo Baksh five annas. "All the co-sharers live in commensality; accounts of profits and losses are not rendered. Anant Singh, as head of the family, manages the work of collection and assessment." Now that document is an extremely important document as regards the statements of fact. As regard the statement of law, the succession descending according to s. 22, it is of little value. The document is a strong assistance to the case of the plaintiff, and bears directly against the case of the defendant. In fact every group of facts that Mr. Doyne has referred to as leading to the inference that the estate was to be held by the head family as an entire estate, excepting the one fact that there was an improper entry in list No. 3 of the talukdars, strengthens the case for the co-sharership.

Only one other remark has to be made, which is, that during the life of Anant Singh, no attempt was made to disturb this state of things. It was after his death, and when his son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture. Both Courts have decided against that claim. Their Lordships entirely agree with them; and they think that the plaintiffs are entitled to a decree for partition.

The only other question remaining is that which concerns the mesne profits. In a partition suit, relating to an ordinary joint family, mesne profits are not recoverable, as was pointed out in the judgment at page 59 in the 14th Indian Appeals. Speaking of the provisions of the Code as to mesne profits, Sir Richard Couch says: "These provisions are intended for, and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree." The taluk here in question was in a very peculiar position; the family were living together as a joint family, and in commensality, Anant acting as head and not

accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family, but in specific and definite shares. Their Lordships consider that if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition. Before the suit, there seems to have been some inconsistency in the defendant's position. Sometimes he said his brothers were only entitled to maintenance; at other times that they were entitled to specific shares of the profits. But by the plaint and the written statement the matter was distinctly put in issue. The plaintiffs claimed between them a 10 annas share of mesne profits. An issue was stated which is perfectly precise upon the point. "For what period are plaintiffs entitled to mesne profits, and what were the aggregate collections for the period claimed?" A commission of inquiry into that question was ordered, but before the commission, although an inquiry was made as to the value of the estate, there was no inquiry as to the profits, because it was considered that sufficient admissions had been made by the defendant to avoid the necessity of any such inquiry. The exact form in which these admissions were made does not appear, but in the judgment of the District Judge, on the issue that has just been read, the 13th, he finds "that the plaintiffs are entitled to Rs. 20,797 as profits upon the defendant's own admission." That is in the first judgment which he delivered before the remand. There was an appeal from his decision to the Judicial Commissioner, and, on that appeal, one of the grounds of objection was, "that the lower Court should have held that the plaintiffs were not entitled to any profits." The suit was then remanded to the District Judge, not on this ground, but on other grounds, to take oral evidence, and, on the remand, the District Judge came to exactly the same finding with respect to mesne profits. A second appeal was presented to the Judicial Commissioner, and in the grounds of objection upon that second appeal there is no mention whatever of any error as to mesne profits. Therefore, although there are difficulties in understanding the exact grounds upon which the Court came to its conclusion, their Lordships must take it that something passed, either before the Commissioner or before the Court itself, on which

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that finding was rested, and which must, at the time of the appeal from the decree on remand, have been satisfactory to the parties. The alternative would be a most disastrous one; it would be necessary to send back this case for an inquiry, which might result in something more being found for mesne profits, or something less, but which would probably cost a great deal more than the amount in dispute.

Their Lordships think that they ought not to disturb the decree upon this point, and the result is that the appeal fails on every point, and it must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Barrow & Rogers.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1889 *January* 10.

GUNAMONI NATH (DEFENDANT No. 7) *v.* BUSSUNT KUMARI DASI (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Vendor and Purchaser—Notice—Notice of possession of rent—Notice of tenancy—Purchaser how far affected with notice of lessor's title.

Notice of possession of the rents of property is notice of the tenancy; but does not of itself affect a purchaser with notice of the lessor's title.

Barnhart v. *Greenshields* (1) referred to.

THE plaintiff, Busunt Kumari Dasi, brought a suit against Nashiram Haldar and six others for the partition of a plot of rent-free *brohmutter* land, containing homestead and garden land and a tank, situate in the village of Barisha in Pergunnah Khaspur, in the District of the 24-Pergunnahs. The property belonged to a family which, at one time, consisted of three brothers—Kristo

* Appeal from Appellate Decree No. 442 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 8th of November 1887, modifying the decree of Baboo Hurikrishno Chatterjee, Munsiff of Alipore, dated the 14th of February 1886.

(1) 9 Moore's P. C., 18.

Chunder Haldar, Pitumber Haldar, and Horihor, also called Horish Haldar. Kristo Chunder died without issue, leaving a widow Padyamoni Debi. Pitumber died leaving a son, Kenaram Haldar (defendant No. 2). Horihor Haldar died in the month of Aughran 1285 B. S. (November-December 1878), leaving a son Nashiram Haldar (defendant No. 1), and a grandson by a son, Upendro Nath Haldar. By a registered deed of sale, bearing date the 24th Choit 1292 B. S. (5th April 1886), Upendro sold his share in the property in suit to the plaintiff. Gunamoni Nath (defendant No. 7) purchased the proprietory right of Padyamoni and Horish Chunder in one bigha one cotta of land let out by them in mourasi to Narsingh Kumar Dut (defendant No. 3) under a lease dated 23rd Assar 1281 (6th July 1874). He also purchased nine cottas more from Padyamoni and Horish contained in the same boundary. This purchase Gunamoni made under a kobala dated the 20th Srabun 1285 (4th August 1878). The deed was not registered, but Padyamoni and Horish made over to Gunamoni the registered kabuliut executed in their favor by the defendant Narsingh Kumar Dut.

This suit and another, brought by the plaintiff against Nashiram Haldar (defendant No. 1), Kenaram Haldar (defendant No. 2), and a third person, for the partition of the joint family dwelling-house of the Haldars, were tried together by the Second Munsiff of Alipur. The issue, so far as the defendant Gunamoni was concerned, and so far as is material to this report, was whether the kobala under which Gunamoni claimed was genuine and *bonâ fide*, and was to be preferred to the registered kobala of the plaintiff.

At the trial dakhilas (receipts) were filed to show that Narsingh Kumar Dut had paid rent to Gunamoni since his purchase in respect of the one bigha one cotta held by him under the lease of 23rd Assar 1281. But Gunamoni admitted that he had not been able to obtain possession of the remaining nine cottas covered by his deed of sale. It was contended for the plaintiff that this deed was a forgery; and, as an unregistered document, could not be preferred to the plaintiff's kobala, which was a registered document and of a later date.

On this issue the Munsiff held that the deed of sale to Gunamoni was not a forgery, but a genuine document; and that, as far

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as the one bigha one cotta leased to Narsingh Dut was concerned it had been accompanied with delivery of possession. He also held that the plaintiff was affected with notice of Gunamoni's purchase. He said: "Although mere possession under an unregistered conveyance is not in itself sufficient to establish a good title against a subsequent registered purchaser, as ruled in the Full Bench case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1), still such possession, especially the possession in the present case, is a very cogent proof of notice—*Nani Bibi* v. *Hafizullah* (2). The Munsiff accordingly decided the issue in Gunamoni's favor, preferring his purchase to that of the plaintiff.

On appeal the District Judge of the 24-Pergunnahs found that there was no proof of notice, nor was there any evidence that the plaintiff knew that Gunamoni was in receipt of rent from Narsingh Kumar Dut. He held that Gunamoni's purchase was invalid as against the plaintiff for want of registration, thus reversing the decision of the Munsiff.

The defendant Gunamoni appealed to the High Court.

Baboo *Umakali Mookerjee* for the appellant.

Baboo *Rash Behary Ghose* for the respondents.

The judgment of the Court (O'KINEALY and TREVELYAN, JJ.) was as follows:—

In this case the point of law which it is necessary to decide is what is the effect as regards notice of possession of the rents of the property in suit. If it be true that the purchaser is bound without notice of the lessor's title, no doubt the learned Judge in the Court below was wrong. If, on the other hand, it be true, as a proposition of law, that he has only notice of the tenancy, and it is the tenant in actual possession alone who can raise any equity against the purchaser, then the Judge in the Court below was right. The point has been expressly decided by the Privy Council. In the case of *Barnhart* v. *Greenshields* (3) their Lordships, in dealing with this question, say as

(1) I. L. R., 8 Calc., 597 S. C.; 10 C. L. R., 241.
(2) I. L. R., 10 Calc., 1073.
(3) 9 Moore's P. C., 18.

follows: "In all the cases to which we have referred, it will be observed that the possession relied on was the actual occupation of the land; and that the equity sought to be enforced was on behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor; or that a purchaser neglecting to inquire into the title of the occupier, is affected by any other equities than those which such occupier may insist on."

It seems, therefore, to us that the point has already been concluded by authority of the Privy Council. The purchaser was bound, as their Lordships say, with notice of the tenancy, and was liable to any equity which the tenant in occupation could raise against him; but he was not bound by notice of the lessor's title, and he has no equity whatsoever.

The result is that this appeal will be dismissed with costs.

C. D. P. *Appeal dismissed.*

SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Trevelyan.

HEILGERS & Co. (PLAINTIFFS) *v.* JADUB LALL SHAW AND ANOTHER (DEFENDANTS.)*

1889 *March* 5.

Contract, Construction of—Cash on delivery—Readiness and willingness to take delivery—Delivery, Failure of, in terms of contract—Breach of contract—Custom.

Where a contract is for delivery "free on board," and cash on delivery is provided for, payment may be required upon delivery of the goods at the time and place mentioned for delivery in the contract.

THIS was a suit, brought by Messrs. Heilgers & Co., to recover Rs. 2,000 as damages from the defendants, who were jute balers, for failure to deliver certain bales of jute in accordance with a contract.

The contract bore date the 25th June 1887, and under it the plaintiffs bought from the defendants two thousand bales of jute at Rs. 12-8 per bale, the terms and conditions being cash on delivery; one thousand bales to be shipped in October, and one

* Small Cause Court Reference No. 6 of 1888, made by H. Millett, Esq., Chief Judge of the Small Cause Court of Calcutta.

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thousand bales between the 1st and 28th November 1887, in lots of 250 at a time.

The suit bore reference only to the thousand bales to be shipped between the 1st and 28th November.

On the 23rd November, the plaintiffs wrote to the defendants, requesting them to place alongside the *G. R. Skolfield*, on the 25th and 26th, two hundred and fifty bales each day, and alongside the *Belle of Bath* two hundred and fifty bales each day, on 26th and 28th November. On the 24th November, the defendants wrote to the plaintiffs, stating that they were unable to deliver on the exact dates referred to, but would deliver the one thousand bales alongside by the 28th November, commencing export from the 26th November.

Early on the morning of the 27th, the defendants sent alongside the *Belle of Bath* five boats' load of jute, but were unable to deliver the same on board owing to the 27th being a Sunday. On the 28th they sent alongside the *G. R. Skolfield* four boats laden with jute; thus completing the delivery alongside of the 1,000 bales.

The defendants, on the 28th November, wrote to the plaintiffs informing them that the bales were alongside as requested, and called upon them to pay for the bales as, and when, delivery was given on board. The plaintiffs received this letter at a quarter to four on the evening of the 28th November, and at once sent off two persons with Rs. 5,000 each to the two ships; these persons arrived alongside at a quarter past four, at which hour both ships had ceased work for the day, and they shortly after returned to the plaintiffs, having been unable to take delivery.

The plaintiffs requested the defendants to bring the boats alongside on the 29th, but they replied that they had tendered the bales on the 28th in accordance with the contract of the 25th June, and that the plaintiffs not having taken delivery and paid for the bales, the contract was considered by them to be cancelled.

The plaintiffs thereupon brought the present suit to recover damages. The defendants admitted the contract, but pleaded that the plaintiffs were not ready and willing to perform their part of the contract.

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The evidence produced showed that the defendants had, on the 15th October 1887, complained to the plaintiffs of delay in payment of their bills under other contracts; and had also on the 26th October informed them that cash on delivery was essential under the present contract, and regretted that the plaintiffs had not hitherto complied with these terms; and on the 25th November again wrote to the plaintiffs, complaining of their delay in making payments under the present contract. The plaintiffs called two or three witnesses, who stated that "Cash on delivery by force of custom" meant "Cash on delivery of the mate's receipts," but no specific instances of such custom were given; and, on the other hand, one of such witnesses stated that he had—since the decision of *Vale King* v. *Jadub Lall Shaw and others*, the present defendants (a case decided on the 12th August 1887 by the Chief Judge in which the defendants had insisted on payments on delivery of the bales with a contract similar to the present, and Vale King & Co. had endeavoured to prove a practice of paying on production of the mate's receipts, and in which the Court held that cash on delivery of each bale was rightly insisted on), for safety's sake—inserted in all future contracts "Cash on production of mate's receipts."

The Chief Judge, in the present case, held that the evidence above referred to was not sufficient to establish a local custom, subverting the plain and well-understood meaning of the words "cash on delivery," which could only mean cash as the goods were delivered; he further found that the plaintiffs had failed to prove that they were ready and willing to perform their side of the contract, as the evidence given showed that had the ships been capable of working at 4-15 on the 28th November, no more than 150 bales could have been received by each boat that evening. He, therefore, dismissed the suit, but at the request of the plaintiffs Counsel referred the following questions to the High Court:—

(1.) When and where was payment to be made by the buyers under the contract?

(2.) What is the meaning and effect of the expressions "Cash on delivery," "Free on board," in the said contract with respect to the mode of payment thereunder?

(3.) Were the buyers bound under the contract to make payment on board ship?

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(4.) Having regard to the course of business followed in contracts of this nature, was payment under the present contract to be made at the office of the buyers against the mate's receipts?

(5.) Did the plaintiffs in any case show sufficient readiness and willingness to perform their part of the contract by their tender made on the 28th November 1887?

At the hearing of the reference,—

Mr. *Acworth*, for the plaintiffs, contended that the meaning of "cash on delivery" was cash in exchange upon mate's receipts at the office; that the words "on" or "upon" have been construed to mean "before" "at time of" or "after," and cited *Cowasjee* v. *Thompson* (1) where the goods had been paid for. [WILSON, J.—That case was one of stoppage *in transitu*, and does not throw any light on this case.] See Benjamin on Sales, p. 838. He also cited *Queen* v. *Humphery* (2), to show that to construe the words strictly would reduce business to a standstill; and referred to *Bourne* v. *Gatliff* (3) as to previous course of business between the parties, and *Humphrey* v. *Dale* (4), to show when oral evidence fixing a liability not provided for by the contract can be used.

Mr. *Bonnerjee* and Mr. *Sale* for the defendants were not called upon.

The opinion of the Court (WILSON and TREVELYAN, JJ.) was delivered by

WILSON, J.—We do not think there is any necessity for us to call on the defendants in this case.

The point is a very small one. The contract out of which the suit arises was a contract for delivery of certain bales of jute, so many in October and so many within certain days of November. The contract was a written one, and contains only a few words having any bearing on the question in dispute. The amounts and price are set out. The goods are to be delivered free on board, and the sellers undertake to deliver as soon as possible. Then under the heading, "Terms and conditions," come the words "Cash on delivery." Then it is provided that 1,000 bales are to

(1) 5 Mad. H. C., 165.
(2) 10 Ad. & El., 335.
(3) 11 Cl. & F., 45 (49).
(4) 7 El. and Bl., 226.

be shipped during October, and 1,000 bales between the 1st and 28th November, in lots of 250 at a time. The real point now is, what is the meaning of "Cash on delivery?" What happened was this: Some days before the 28th November, I think on the 23rd, plaintiffs wrote to the vendors (defendants) and said they desired a certain quantity of bales delivered on the 25th and 26th November, so much on one ship, so much on another. The defendants replied that they could not exactly comply with the plaintiffs' desire as to time of delivery, but they would deliver the whole quantity by the 28th, which would be within time according to the contract. As a fact, it turned out that the vendors had their lighters alongside the ships on Sunday and Monday, the 27th and 28th, and were ready and willing to give delivery, if paid then and there for the jute.

On Monday the 28th, rather late in the day, a communication was made to the purchasers on the subject, and then when it was too late for delivery to be given on that day of the whole of the bales, they sent some one on board the ships with cash to pay for the bales as they were delivered. The consequence of this delay was that the bales were not delivered. The plaintiffs cannot say they were taken by surprise, as there had been correspondence between the parties in which the vendors said they would insist strictly on their rights under the contract, and it was known what they meant by that, as similar points had been the subject of litigation in a case in which the present defendants were concerned; and that the plaintiffs did not think they could safely assert any other view of the contract is plain from what they did on the 28th when they sent cash on board the ships. Under these circumstances, the plaintiffs have brought this suit against the defendants for non-delivery of the jute. The defence is that the vendors were ready and willing to deliver the jute if the plaintiffs had been ready to pay for it as it was delivered. The only question, then, as I said before, is what is the meaning of the words "Cash on delivery." The defendants say the words mean, cash as the bales are delivered over the ship's side.

The plaintiffs say they mean, cash in exchange for mate's receipts to be brought to their office. These words are of common occurrence not only in this country, but all over the world; and it would be a most dangerous thing if we were to introduce

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any doubt as to their meaning. Cash on delivery means cash in exchange for and simultaneous with delivery of the goods. If doubt were allowed as to the meaning of these words, it might also be raised as to the meaning of other just as common words, such as payment against shipping documents.

No doubt such a contract, if rigidly enforced, may in many cases prove very troublesome to the parties, and, consequently, we find from the evidence that some mercantile men avoid such a form of contract. Sometimes the purchaser waives a little of his rights and pays for the goods a little before delivery. Sometimes the vendor waives a little of his rights and takes payment on presentation of the mate's receipts. But that does not alter the plain meaning of the words.

Then it is said that there is evidence of custom which alters the meaning of the words. In the first place, I think it may well be questioned whether evidence could be given to contradict the plain meaning of these words of a written contract; but whether that be so or not, there is nothing in this case amounting to evidence of custom to show that a different meaning should be put on the words from the natural one. The evidence goes no further than to say that the difficulty in most cases is got over by one party giving way a little. The result is that we think the learned Judge's decision is correct.

The first three questions referred to us are :—

[His Lordship read the first three questions, see *ante* p. 419, and continued.]

These three questions it is convenient for us to answer together by saying that, where a contract is for delivery "free on board," and "cash on delivery" is provided for, payment may be required upon delivery of the goods at the time and place mentioned in the contract for delivery.

The other two questions we answer in the negative.

Messrs. *Sanderson & Co.*, attorneys for the plaintiffs.

Mr. *H. C. Chick*, attorney for the defendants.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

SONATUN SHAH AND OTHERS (DECREE-HOLDERS) *v.* ALI NEWAZ KHAN AND ANOTHER (JUDGMENT-DEBTORS). * 1889 *January* 31.

Transfer of Property Act (IV of 1882). ss. 88, 90—Decree unsatisfied by sale of mortgaged property—Right to decree for sale of other than mortgaged property.

The holder of a decree on a mortgage obtained an order under s. 88 of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this, when sold, being insufficient to satisfy the decree, he applied for a decree under s. 90 for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under s. 88. *Held*, that the decree-holder was entitled to the decree asked for. The terms of s. 90 contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under s. 90 for realization of the balance from other properties of the debtor (1).

IN this case the decree-holders obtained, on the 5th December 1879, a decree on a mortgage executed in their favour by the judgment-debtors: and on 25th February 1885, they obtained a decree for sale of the mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882). Under that decree the mortgaged property was sold, but the proceeds of sale were insufficient to satisfy the amount due under the mortgage decree, and they then applied for an order under s. 90 of the Act for realization of the balance from the other property of the judgment-debtors; and on this application the Subordinate Judge made the following order:—

"The judgment-debtors in this case have objected that there being no order in the decree executed for the realization of the decretal amount from the person or other property of the judgment-debtors, the present application for execution against the property of the judgment-debtors

* Appeal from Order No. 401 of 1888, against the order of Baboo Promotha Nath Banerjee, Subordinate Judge of Mymensingh, dated the 4th of September 1888.

(1) See *Gopal Das* v. *Ali Muhammad*, I. L. R., 10 All., 632.

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other than the property mortgaged is not tenable. It is admitted by the pleader for the decree-holder, and it also appears from the decree filed, that a decree enforcing the lien on the mortgaged property was obtained by the decree-holder on the 5th December 1879, *i.e.*, previous to the passing of the Transfer of Property Act (IV of 1882), and that the decree-holder prayed for an order for the sale of the mortgaged property in a subsequent suit under the provision of Act IV of 1882. The decree obtained in the latter suit (a copy of which has been filed) shows that there is simply an order for the realization of the decretal amount from the sale of the mortgaged property, and it does not contain any order for the realization of the balance, if any, of the money due from the person or the other property of the judgment-debtors : consequently I am of opinion that the decree-holder cannot proceed against the other property of the judgment-debtors without such an order. Rule 12 framed by the High Court under the provision of s. 104 of the Transfer of Property Act directs that every decree for sale under the Act shall direct that if the proceeds of the sale shall not be sufficient to satisfy the decree, the defendant (mortgagor) shall personally pay the amount of the deficiency (see p 735, Appendix B of Macpherson's Law of Mortgage, 7th Edition, and p. 168, para. I of Belchambers' Rules and Orders of the High Court.) It has been held by the Allahabad High Court [see *Pran Kuar* v. *Durga Prasad* (1)], and also by the Bombay High Court [see *Budan* v. *Ram Chandra Bhunjgaya* (2)] that a decree upon a mortgage which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor. It has also been held by the Bombay High Court in the case above quoted that a decree cannot be extended in execution beyond the real meaning of its terms. The pleader for the decree-holder contended that he has obtained the latter decree under the provision of s. 67 of Act IV of 1882, and that the provision of s. 90 of the Act is applicable to it ; but the said section shows that if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a *decree* for such sum ; it cannot make an order in the execution department for the recovery of such sum. My predecessor in office, who decided the case, might have passed a decree for the recovery of any such sum. For all these reasons, I allow the objection with costs, and strike off the execution case as being unsustainable."

From this order the decree-holders appealed to the High Court.

Baboo *Hem Chunder Banerjee*, Baboo *Mohini Mohun Roy*, and Baboo *Kashi Kant Sen* for the appellants.

Munshi *Seraj-ul-Islam* for the respondents.

(1) I. L. R., 10 All., 127. (2) I. L. R., 11 Bom., 537.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

The appellant obtained a decree within the terms of s. 88 of the Transfer of Property Act for sale of the mortgaged properties. These properties, when sold, failed to realize the amount of the mortgage debt. The mortgagee, decree-holder, accordingly made an application somewhat vaguely expressed, but evidently intended to ask for a decree within the terms of s. 90 of the Transfer of Property Act for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge has refused to make any decree or order under s. 90, considering himself in some manner restricted by the action of his predecessor in passing the previous decree under s. 88. We think that this is a mistaken view of the law. The terms of s. 90 in our opinion clearly contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, mortgagor, he can ask for and obtain a decree within the terms of s. 90 for realization of the balance from other properties of the debtor. We accordingly set aside the order of the Subordinate Judge, and if we had before us sufficient materials, we should ourselves have passed a decree under s. 90. But in the absence of sufficient information, we think it right to set aside the order of the Subordinate Judge and to direct that, after making the necessary enquiries, he do pass a decree under s. 90, and then allow the execution to proceed. It is not necessary, as contended by the respondents' vakeel, to bring a separate suit for this matter. We give no costs in this appeal.

J. V. W. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

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SHAMA DASS (PLAINTIFF) *v.* HURBUNS NARAIN SINGH AND OTHERS (DEFENDANTS).*

Appeal—Ex parte decree—Order setting aside ex parte decree—Civil Procedure Code (Act XIV of 1882), *ss.* 108, 588—*Notification in "Gazette."*

There is no appeal from an order setting aside an *ex parte* decree.

THIS was an appeal against an order setting aside an *ex parte* decree, on the ground that the summons had not been served upon the defendants.

Mr. *Bonnerjee* and Baboo *Umakali Mookerjee* for the appellant.

Mr. *C. Gregory* and Baboo *Romesh Chunder Bose* for the respondents.

Mr. *Gregory* took a preliminary objection that there was no appeal from such an order.

The following judgments were delivered by the Court (TOTTENHAM and BANERJEE, JJ.)

TOTTENHAM, J.—This is an appeal against an order passed by the lower Court setting aside an *ex parte* decree.

A preliminary objection was taken on the part of the respondents by Mr. Gregory, that from such an order no appeal lies under s. 588 of the Code.

This question was argued at considerable length; and reserving our judgment upon it, we also heard the appeal on the merits. Upon consideration, I am of opinion that Mr. Gregory is right, and that no appeal lies. When Act XIV of 1882 was passed, the wording of s. 588, cl. 9, was to this effect: "Orders rejecting applications under s. 108, or an order to set aside a decree *ex parte*." Under this clause, apparently an appeal would lie from the order now before us; but I find that the word "or" in the clause after s. 108 was by an error placed for the word "for." In August 1882, that is, one month after the Act came into force, a corrigendum was

* Appeal from Order No. 434 of 1888, against the order of Baboo Rakhal Chunder Bose, Subordinate Judge of Shahabad, dated the 13th of August 1888.

published in the *Gazette of India*, under the signature of the Secretary to the Government in the Legislative Department, by which it was notified that the word "for" ought to have stood for "or" in this clause. I think I am justified in taking judicial notice of this notification and acting upon it. It is true that the amending Act (VII of 1888) assumes the original wording of the clause to have been correct, for the Act deliberately provides that the word "for" shall stand in the place of "or;" but in the statement of objects and reasons, which accompanied the Bill when framed, it was stated that the amendment of this clause was only intended to correct a typographical error. It is clear to me, therefore, that the Legislature never intended to enact that there should be an appeal from an order setting aside a decree passed *ex parte*.

That being so, I allow the preliminary objection in this case and dismiss the appeal with costs.

BANERJEE, J.—I also am of the same opinion. I think that the Code of Civil Procedure, even as it stood previous to the passing of the amending Act (VII of 1888), did not allow any appeal from an order granting an application for setting aside an *ex parte* decree.

It was contended that cl. 9 of s. 588, as it stood before the amendment by Act VII of 1888, allowed such an appeal. If that clause stood alone, this contention would have been right. But that is one of a series of clauses; and regard being had to the context, and especially to the language of cl. 8, which immediately precedes, it is clear that the word "or" in cl. 9 is a misprint for the word "for." Orders against which appeals are provided for by s. 588 are invariably referred to in the plural number, and where more descriptions of orders than one are provided for in one and the same clause, they are connected by the word "and," and not by the disjunctive particle "or." Clause 14 may be referred to in this connection. Referring to the state of the law as it stood before the passing of Act XIV of 1882, we find the same view supported; for cl. 9 of Act XII of 1879, which in other respects agrees word for word with the clause now under consideration, has the word "for" in the place of the word "or," thereby indicating that

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the Legislature then allowed appeals only against orders rejecting applications for setting aside *ex parte* decrees, and not against orders allowing such applications. And going further back, and referring to Act VIII of 1859, we find that the state of the law was the same under that Act. The reason of the thing would show that there is no ground for thinking that the Legislature intended to make any change in the law; for whereas an order rejecting an application for setting aside an *ex parte* decree leaves the party against whom the order is passed without any further remedy except an appeal against that order; an order allowing an application for setting aside an *ex parte* decree, leaves the party against whom the order is made ample remedy by prosecuting his suit, in which, if he is in the right, he may yet succeed. All this was conceded in argument; and the learned Counsel for the appellant admitted that, if the construction of this clause depended merely upon a construction of s. 588, the preliminary objection would be almost unanswerable. But it was contended that the Legislature, by having recourse to the process of legislation for the purpose of altering the word "or" into "for," has shown that we are no longer at liberty to suppose that it was a misprint for "for." I do not see much force in this contention. All that the Legislature did was only to guard against any possibility of error in construing s. 588; and, as my learned brother has shown, a reference to the statement of objects and reasons for making the change in question shows that what the Legislature meant to do was merely to correct a typographical error. If that is their express object, there is no force in the argument that we must presume their object to have been to alter the law and make it by the amending Act something different from what it was originally intended to be.

T. A. P.

Appeal dismissed.

CIVIL RULE.

Before Mr. Justice Pigot and Mr. Justice Beverley.

IN THE MATTER OF ANUND CHUNDER ROY (AUCTION-PURCHASER) *v.* NITAI BHOOMIJ (JUDGMENT-DEBTOR).* 1889 *February* 20.

Appeal—Appeal newly given by law—Proceedings instituted prior to change in procedure—Appeal from order under s. 312, *Civil Procedure Code* (*Act XIV of* 1882)—*Act VII of* 1888, *ss.* 55 *and* 56.

It is a general principle of law that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. *Held*, accordingly, that an appeal from an order under the second paragraph of s. 312 of the Civil Procedure Code, although made before Act VII of 1888 came into force, would, upon the operation of that Act, lie to the Court, to which an appeal would lie from the decree in the suit in relation to which such order was made. *Hurrosundari Dabi* v. *Bhojohari Das Manji* (1) explained and distinguished.

ON the 5th September 1887, Anund Chunder Roy purchased a tenure at an auction sale held in execution of a decree for rent against Nitai Bhoomij. On the 7th June 1888, the sale was set aside by an order made by the Munsiff of Purulia under the second paragraph of s. 312 of the Code of Civil Procedure. In July 1888, a few days after Act VII of 1888 came into operation, Anund Chunder Roy appealed from this order to the Deputy Commissioner of Manbhoom, who dismissed the appeal on the ground that he had no jurisdiction to hear it, observing: "It is, however, clear that no appeal lies. By s. 588, clause (16) and s. 589, it is provided that an appeal lies *to the High Court* from 'orders under s. 294, the first paragraph of s. 312 or s. 313, for confirming, or setting aside, or refusing to set aside a sale of immoveable property.'

"The difference between the terms of s. 588, clause (F) of Act X of 1877, the former Civil Procedure Code, appears to indicate that the Legislature advisedly took away the right of appeal in cases in which the objection had been allowed, and the sale set aside. Even if this were otherwise, the appeal, if any,

* Civil Rule No. 1302 of 1888, against the order passed by E. N. Baker, Esq., Deputy Commissioner of Manbhoom, dated the 27th of August 1888.

(1) I. L. R., 13 Calc., 86.

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would lie to the High Court, and not to this Court. I have, therefore, no jurisdiction.

"By ss. 55 and 56, Act VII of 1888, an appeal has been allowed in this class of cases to the District Court. This Act came into force on the 1st July 1888, a few days before this appeal was filed; and it is argued that the procedure and jurisdiction in the case before me are therefore governed by its provisions. This, however, does not appear to be correct. In *Hurrosundari Dabi* v. *Bhojohari Das Manji* (1), it was held that the words 'any proceedings commenced before the repealing Act shall have come into operation' in s. 6 of the General Clauses Act I of 1868 include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. The *ratio decidendi* of this case applies equally whether the repealing Act repeals an entire Act, or only portion of an Act. It follows, therefore, that this appeal is governed by the law as it stood at the time of institution of the original suit, *i.e.*, in the year 1883. As already stated, no appeal lies to this Court under the law as it stood then."

On the 16th November 1888, Anund Chunder Roy moved the High Court, and obtained a rule, calling upon the judgment-debtor, respondent, Nitai Bhoomij, to show cause why the order of the Deputy Commissioner of Manbhoom, dated the 27th August 1888, refusing to hear an appeal from an order under s. 312 of the Civil Procedure Code, made by the Munsiff of Purulia, and dated the 7th June 1888, should not be set aside on the ground that the Deputy Commissioner had jurisdiction to entertain the appeal under the provisions of Act VII of 1888.

On the rule coming up for argument,—

Baboo *Kishori Lal Goswami* for the petitioner.

Baboo *Issur Chunder Chuckerbutty* and Baboo *Upender Chunder Bose* for opposite party.

The judgment of the Court (PIGOT and BEVERLEY, JJ.) was as follows:—

In this case an order under the second paragraph of s. 312 of the Civil Procedure Code, setting aside a sale on the

(1) I. L. R., 13 Calc., 86.

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ground of a material irregularity, was made by the Munsiff of Purulia.

The order was made on the 7th June 1888, before Act VII of 1888 came into force; and, therefore, when the order was made, no appeal lay from it to the Court of the Deputy Commissioner.

Act VII of 1888 came into force on July 1st, 1888. By that enactment an order made under s. 312 is made appealable to the Court, to which an appeal would lie from the decree in the suit in relation to which such order was made. In the present case such Court would be that of the Deputy Commissioner.

After the 1st July, an appeal was presented to the Deputy Commissioner from the order of June 7th. The Deputy Commissioner rejected it, holding that the new enactment did not apply, as the suit in which the order was made was instituted under the Act of 1882, under which no such appeal was allowed to his Court; that, therefore, the old law governed the matter, and that he had no jurisdiction to hear the appeal.

From that order this appeal is brought. The decision appealed from is founded on the decision of this Court in *Hurrosundari Dabi* v. *Bhojohari Das Manji* (1), in which it was held that no appeal lay against a decree in a suit instituted under the old Bengal Rent Act VIII of 1869, although the appeal was presented after the new Act VIII of 1885 came into force, by which Act (it was assumed for the purpose of the argument) an appeal was given.

That case was decided upon the construction of s. 6 of the General Clauses Act. The appeal, if it was given, was given by the Act of 1885, which repealed the Act of 1869; and it was held, that as the repeal of the Act of 1869 could not affect proceedings commenced before the repealing Act came into operation, and as the word "proceedings" in the General Clauses Act includes an appeal against a decree made before the passing of the repealing Act, the appeal did not lie.

In the present case, the question does not arise in respect of the provisions of a repealing Act. So far as the ss. 55 and 56 of Act VII of 1888 affect the present proceedings, they do so, not by repealing the former Act, but by adding to its provisions

(1) L. R., 13 Calc., 86.

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an appeal in a case in which the former Act did not allow one. They advance the remedy of the subject in this particular respect. We do not think, therefore, that the General Clauses Act applies.

That being so the general principle of law is applicable, that an appeal newly given by law is made applicable to proceedings instituted before that change in procedure is made. That principle is contravened by the General Clauses Act (whether intentionally or not) in cases where the appeal is conferred by means of the operation of the repeal of an existing Act. But that effect of the General Clauses Act must be limited to the cases strictly covered by its provisions. The present is not such a case. We hold, therefore, that the appeal lies to the Court of the Deputy Commissioner. We make the rule absolute.

We set aside the order of the Deputy Commissioner, and direct him to entertain the appeal.

The costs of this Rule will be disposed of by the Deputy Commissioner on the hearing of the appeal we now direct him to entertain. We assess the hearing fee on each side at three gold mohurs.

C. D. P. *Rule made absolute.*

CIVIL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Trevelyan.

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March 6.

RAMEN CHETTY (PLAINTIFF) *v.* MAHOMED GHOUSE AND ANOTHER (DEFENDANTS).*

Stamp Act, 1879, *Sch. I, Arts.* 11, 19—*Cheque—Bill of Exchange, Admissibility in evidence—Post-dated cheque—Stamp Act*, 1879, *s.* 67—*Penalty.*

In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, the document itself as it stands, and not any collateral circumstances which may be shown in evidence, must be looked at.

Bull v. *O'Sullivan* (1), *Gatty* v. *Fry* (2), and *Chandra Kant Mookerjee* v. *Kartik Charan Chaile* (3) referred to.

* Rangoon Reference No. 1 of 1889, made by C. E. Fox, Esq., Officiating Recorder of Rangoon, dated the 11th of January 1889.

(1) L. R., 6 Q. B., 209. (2) L. R., 2 Ex. D., 265.
(3) 5 B. L. R., 103.

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Where a cheque bearing a stamp of one anna was dated the 25th September, and the evidence showed it to have been actually drawn on the 8th September, and therefore to have been post-dated, it was contended that the cheque was really a bill of exchange, payable 17 days after date, and therefore inadmissible in evidence as being insufficiently stamped.

Held, in a suit to recover the amount of the cheque on its being dishonoured, that it was admissible in evidence.

REFERENCE to the High Court at Calcutta under s. 54 of the Burma Courts Act, 1875.

The case was stated as follows in the reference :—

"This suit is described in the plaint as a suit for the recovery of the sum of Rs. 1,543-14 due for principal and interest on a dishonoured cheque.

"The plaint sets out that, on the 8th September 1888, the second defendant drew a cheque on the Bank of Bengal, directing the payment to the first defendant "or bearer" of the sum of Rs. 1,541-5-0.

"The cheque is as follows :—

M. 41036. RANGOON, *25th September*, 1888.

No.——

BANK OF BENGAL. One anna Stamp.

Pay to S. Mahomed Ghouse, or bearer, Rupees fifteen hundred forty one and annas five only (Rs. 1,541-5-0).

(Sd.) TURNER & Co.

"The plaint continues that the first defendant requested the plaintiff to pay the said sum of Rs. 1,541-5, and the plaintiff accordingly paid the same, less discount; that on the 25th September the cheque was presented at the Bank of Bengal for payment, but was dishonoured.

"The second defendant admits having made, and the first defendant admits having endorsed, the cheque, but they defend the suit on the ground that the cheque having been post-dated when made, and the plaintiff having received and dealt with it, knowing it to be post-dated, it cannot be admitted in evidence, and cannot be recovered upon. It is contended that the persons making and dealing with the cheque are subject to the penalty mentioned in s. 67 of the Stamp Act, and that the

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cheque must be regarded as a bill of exchange payable at 17 days after date, and, not being stamped as such, it is inadmissible in evidence by the first clause of the proviso to s. 34 of the Stamp Act. In support of these contentions the cases of *Allen* v. *Keenes* (1) and *Whitwell* v. *Bennett* (2), decided under the older English statutes, and *Forster* v. *Mackreth* (3) are relied on. In the latter case four learned Judges, after much consideration, were all of opinion that in substance a post-dated cheque could not be distinguished from a bill of exchange at so many days' date.

"For the plaintiff it is contended that a person making or dealing with a post-dated cheque is not subject to the penalty mentioned in s. 67, because the word 'cheque' is not expressly mentioned in the section, whereas it is expressly mentioned in s. 61 of the Act. This omission is said to indicate an intention on the part of the Legislature that post-dating cheques should not be subject to penalty, although 'cheque' is defined in the Act as meaning 'a bill of exchange drawn on a banker and payable on demand.' Further, it is contended that the cheque is rightly stamped on the face of it, and that nothing further can be considered in testing whether it is admissible in evidence under the Stamp Act. The cases of *Bull* v. *O'Sullivan* (4), and *Gatty* v. *Fry* (5), are relied on in support of this contention. The judgment of Peacock, C.J., in the case of *Chandra Kant Mookerjee* v. *Kartick Charan Chaile* (6) also supports this view.

"It appears to me that these cases afford great authority for holding that the cheque in suit is admissible in evidence, but being of opinion that s. 67 does attach a penalty to the making of and dealing with a post-dated cheque, thereby differing from the English statutes under which the two English cases above referred to were decided, and in view of the opinion of the Judges in the case of *Forster* v. *Mackreth* (3), I entertain doubt whether in this case, where the allegations in the plaint show that the plaintiff knowingly dealt with a post-dated cheque, that cheque can be admitted in evidence and be recovered on.

"I therefore refer to the High Court the question whether the cheque sued upon in this suit is admissible in evidence."

(1) 1 East, 435; 3 Esp., 281.
(2) 3 B. and P., 559.
(3) L. R., 2 Ex., 163.
(4) L. R., 6 Q. B., 209.
(5) L. R., 2 Ex. D., 265.
(6) 5 B. L. R., 103.

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At the hearing of the reference,—

Mr. *P. O'Kinealy* appeared for the plaintiff, and contended that the cheque was sufficiently stamped, and that there were no findings of fact to bring the case within s. 67.

The defendants were not represented by Counsel.

The following opinions were delivered by the Court (WILSON and TREVELYAN, JJ.):—

WILSON, J.—In my opinion the authorities which are referred to by the learned Recorder in his order of reference are conclusive upon the question which is now before us. The cases of *Bull* v. *O'Sullivan* (1) and *Gatty* v. *Fry* (2), which cases are entirely in accordance with the earlier authorities, are clear to show that in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, you must look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence; and exactly the same law is laid down in this Court in the judgment of Sir Barnes Peacock in the case of *Chandra Kant Mookerjee* v. *Kartik Charan Chaile* (3) in the passage at page 105 of the report. That is conclusive of the present case; for it is clear, I think, that the present Stamp Act in India ought to be construed according to the same principles of construction as the Stamp Act in England and the earlier Stamp Acts in this country. In argument, apparently, before the Recorder, s. 67 of the Act was referred to. That section imposes penalties in certain cases upon persons who post-date bills of exchange. It is not necessary to say whether a cheque is a bill of exchange within the meaning of that section, or what the effect of that section would be, in any case to which it applied, upon the admissibility of a bill, because in the present case there is no evidence apparently, and certainly no finding, of the circumstance which alone could make the section applicable, namely, the intention to defraud. The result is that we answer the question referred to us in the affirmative.

TREVELYAN, J.—I agree with this decision.

J. V. W.

(1) L. R., 6 Q. B., 209. (2) L. R., 2 Ex. D., 265.
(3) 5 B. L. R., 103.

SMALL CAUSE COURT REFERENCE.

Before Mr. Justice Wilson and Mr Justice Trevelyan.

1889
March 6.

BOISTUB CHURN NAUN AND OTHERS *v.* WOOMA CHURN SEN.*

Excise Act (Bengal Act VII of 1878)—Revenue, Protection of—Contract Act (IX of 1872), s. 23—Public policy.

The Bengal Excise Act of 1878 is not an Act framed solely for the protection of the revenue, but is one embracing other important objects of public policy as well.

An agreement, therefore, for the sale of fermented liquors, entered into by a person who has not obtained a license under that Act, is void and cannot be recovered on.

SUIT to recover money for goods sold and delivered.

The plaintiffs who had not taken out a license for the sale of fermented liquors, under Bengal Act VII of 1878, sold to the defendant a certain quantity of porter and beer, and sued him for the price thereof.

The defendant contended that the contract was void under s. 23 of the Contract Act, inasmuch as the plaintiffs had sold the goods without obtaining a license under the Excise Act.

The Chief Judge of the Small Cause Court held that the Excise Act of 1878 was an Act framed in the interest of the public, and that the contract under which the goods were sold by the plaintiffs, who were unlicensed, was void under s. 23 of the Contract Act, and that, therefore, this suit to recover the price of the goods so sold would not lie; he therefore dismissed the suit, but, at the request of the parties, referred the following question (amongst others) to the High Court, *viz.* :—

4. Is the agreement void having regard to the provisions of the Bengal Excise Act of 1878?

Mr. *Acworth* (with him Baboo *Kali Nath Mitter*) for the plaintiffs.—The Bengal Excise Act is purely a Revenue Act, and has no

* Small Cause Court Reference No. 7 of 1888, made by H. Millett, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 24th of July 1888.

such effect, as has been given to it, on the contract of sale. There is no section in the Act which forbids such a suit as the present. This case does not fall within *Bexley* v. *Bignold* (1); nor is the passage in p. 487 of Maxwell on Statutes referred to by the Judge applicable. Revenue Acts are treated as being for the protection of the revenue and not on grounds of public policy. I submit the contract was not illegal. See Maxwell on Statutes, p. 490, and *Bailey* v. *Harris* (2) decided on 2 Wm. IV, c. 16, s. 12, and 6 Geo. IV, c. 80, s. 115. See also *Brown* v. *Duncan* (3); *Johnson* v. *Hudson* (4) decided under 29 Geo. III, c. 68, ss. 72 and 124; *Smith* v. *Mawhood* (5) decided under 6 Geo. IV, c. 81, s. 26.

Mr. *Dill* for the defendant.—The Excise Act has for its object the protection of the public as well as the revenue. As to cases on similar statutes in force in England, and to the general rule deducible from such statutes, see Benjamin on Sales, 526. Sections 11 and 53 of the Bengal Excise Act show it was the intention of the Legislature to prevent the sale without license of anything but very small quantities of fermented liquors, and the distinction drawn in that section between "tari" and fermented liquors shows that it is the question of these liquors being intoxicating which is paramount; the case of *Ritchie* v. *Smith* (6) was decided on the Statute 9 Geo. IV, c. 61, which was held to be for the protection of public morals as well as of the revenue. The case of *Judoonath Shaha* v. *Nobin Chunder Shaha* (7), decided on Bengal Act II of 1866, decides that an agreement having for its object the carrying on a trade in contravention of the Excise Law is illegal—See also *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (8) and *Debi Prasad* v. *Rup Ram*, (9). Sections 14, 29 and 50 of the Bengal Excise Act also show that one of the objects of the Legislature in passing the Act was the prevention of drunkenness.

Mr. *Acworth* in reply.—No cases have been cited by the other side showing that a sale similar to the present contract

(1) 5 B. & Ald., 335.
(2) 12 Q. B., 905.
(3) 10 B & C., 93.
(4) 11 East, 180.
(5) 14 M. & W., 452.
(6) 6 C. B., 462.
(7) 21 W. R., 289.
(8) I. L. R., 12 Bom., 422.
(9) I. L. R., 10 All., 578.

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of sale has been held to be void; I however admit that there are cases somewhat resembling those in which contracts have been held to be void on grounds of public policy or under some particular statute. In *Ritchie* v. *Smith* (1) the case of a sale was expressly exempted, and the Court in the course of argument expressly stated that it was not intended to touch the case of *Smith* v. *Mawhood* (2), and that the contract was not illegal so as to make it absolutely void. The plaintiffs and defendant were not parties conspiring to defeat the Act. The English cases show that where a penalty is exacted it does not invalidate the sale. Licensing Acts have always co-existed in England with the Excise Acts; does it make any difference, if it be so, that the two Acts are consolidated in this country? The English Licensing Act of 1872, 35 and 36 Vic., c. 94, s. 13, is almost identical with s. 67 of the Bengal Act. The case of *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (3) is decided on the principle laid down in *Ritchie* v. *Smith* (4); the case of *Debi Prasad* v. *Rup Ram* (5) is also decided on that principle; but *Ritchie* v. *Smith* does not belong to the class of cases which should be considered in answering the question referred. All that *Ritchie* v. *Smith* decides is that where one man takes advantage of another man's license, such an act is illegal, but the case does not refer to an outside purchaser. Section 14 only provides that the operation of the Act may be suspended in certain cases; the Government may have had reason for exempting where the consumption is small. The argument of the other side on s. 50 is answered by *Bailey* v. *Harris* (6). Section 23 of the Contract Act only affirms the English law on the subject. The case of *Lorymer* v. *Smith* (7) was a sale by sample and has no application to the particular case; here the defendant bought specific goods on their own judgment—*Cf.* *Burnby* v. *Bollett* (8).

(1) 6 C. B., 472.
(2) 14 M. & W., 452.
(3) I. L. R., 12 Bom., 422.
(4) 6 C. B., 472.
(5) I. L. R., 10 All., 578.
(6) 12 Q. B., 905.
(7) 1 B. & C.,
(8) 16 M. & W., 644; 3 M. & W., 390.

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The opinion of the Court (WILSON and TREVELYAN, JJ.) was delivered by

WILSON, J.—The principal question which has been raised before us in this reference is whether a contract for the sale of fermented liquor, by a person who has not obtained a license under Bengal Act VII of 1878, is illegal and therefore void.

The sections bearing upon the matter are these: Section 4 has defined exciseable articles as including spirituous and fermented liquors. Section 11 says that no person shall sell any exciseable article without a license from the Collector. Section 53 says whoever manufactures or sells any exciseable article without a license shall be liable to a fine not exceeding Rs. 500 for every such manufacture or sale, and then come the provisos, with the last of which I shall deal presently.

A number of cases have been cited to us from the English Courts upon the question, in what cases and under what statutes the imposition of a penalty is to be construed as intended to prohibit the Act to which the section refers, and in what cases that penalty should be regarded as only a means for protecting the revenue.

Two tests have been applied in many of the cases. First, in a number of cases it has been said, and the view has been acted upon, that in an Act intended only for the raising of revenue and the protection of that revenue, a clause imposing a penalty may well be construed, not as prohibiting a transaction in such a sense as to make it illegal and void, but as providing a means of enforcing the liability of the person on whom the penalty is imposed.

If that test be applied in the present case, it seems to me that the conclusion at which the Judge of the Small Cause Court has arrived is correct; because it seems to me clear that the Act with which we are dealing is not, and was never intended to be, a mere Act for the protection of the revenue, but that it is an Act having other objects of public policy in view as well. In the first place we should be shutting our eyes to what is a matter of common knowledge, that in this country as well as in England for many years past, from a period long before this Act was passed, public men have never supposed that the regulation of the traffic in intoxicating liquors is to be dealt with upon considerations of

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revenue alone. In the second place, when we turn to the Act itself, I think the same thing is apparent from its express language, in which respect it is unlike the Act of 6 George IV, c. 51, under which several of the cases cited to us were decided, particularly the case of *Smith* v. *Mawhood* (1). The preamble of the Act is a good deal wider than if the object were merely the protection of the revenue. It is this: "Whereas it is expedient to consolidate and amend the laws relating to the manufacture sale and possession of exciseable articles;" and there is another object, "the collection of the revenue derived therefrom;" and as we go through the Act, we find that these two objects are kept, side by side, in view, the regulation of the drink traffic in the interests of the public, and the protection of the revenue. This is particularly apparent from certain sections in the Act. Section 14 was referred to, and it is not without weight. The 29th section is an important section, because it shows that a license is to be cancelled, not only on grounds affecting the revenue, but on grounds affecting the character of the holder, showing, I think, clearly, that in that section at any rate the Legislature had in view public morals, as well as the protection of the revenue.

Then s. 62 has been referred to, and I think rightly referred to, because it shows that a difference is made between the holding the same article for a purpose connected, and for a purpose not connected, with the traffic in intoxicating drinks.

Then s. 67 expressly deals with cases of misconduct on the part of a person holding a license, and the permission of misconduct by such a person of a character directly connected with public morals and not with the receipts of revenue. And again, s. 80 is another special provision relating to the case of cantonments. The object of s. 80, I apprehend, can be nothing but the securing of the discipline, the morals and good conduct of the troops in cantonments. The consequence then to my mind is, that both on general principles and the terms of the Act itself, this Act cannot be said to be a mere Revenue Act, but it is an Act having no doubt the protection of the revenue in view, but having in view also important objects of public policy.

(1) 14 M. & W., 452.

Another test has been applied in various cases in order to determine whether the penalty imposed by an Act was intended to create a prohibition so as to invalidate a specific act of dealing in violation of the law in which the penalty is to be found, and that is, to see whether the penalty is imposed in general terms for the carrying on of a trade, or for the omission of some preliminaries which the law imposes on the opening of a trade, or some such general purpose as that, or whether the penalty is imposed on each specific act of dealing. In the latter class of cases, the Courts have been prone to construe the penalty as creating a prohibition, and therefore vitiating each transaction.

If that test be applied in this case, it is clear that the penalty is imposed on each specific act. Section 53 of the Act imposes, for selling an exciseable article without a license, a fine of so many rupees for every such sale. Thus what the Legislature had in view was not merely the general carrying on of the trade of a trader, but every specific act of sale. This is the more apparent from some of the provisos which follow the general words in that section. The third proviso says that "Nothing contained in the first clause of this section applies to the sale of any imported spirituous or fermented liquors purchased by any person for his private use and so disposed of upon such person quitting a station or after his decease." That proviso shows that in the view of the framer of the section, if it had not been for the proviso, any officer who, on being ordered from one station to another in Bengal, sold his stock of wine to his successor, or to anybody else, would be liable to the penalty if he did so without having a license; and that if the executor of any gentleman dying in Calcutta were to sell his stock of wine, without taking out a license, he would, but for the proviso, be liable to a penalty. All this shows that the thing which the Legislature had in view was any act of sale; and that according to the authorities is strong to show that the penalty is imposed with the view of prohibition.

The result then is, that, according to the authorities, this case falls within the class of those in which the penalty is imposed for the purpose of prohibition, and not of those in which it is imposed solely for the benefit of the revenue.

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Several cases decided in the Indian Courts have been cited, but they do not throw a very strong light upon this case. They related not to contracts of sale but contracts of a different character. The result is that, in my opinion, we ought to answer the fourth question referred to us in the affirmative, and as that disposes of the whole case, it is unnecessary to answer any of the others.

Attorney for the plaintiffs: Baboo *Kali Nath Mitter.*

Attorney for the defendant: Baboo *B. N. Bose.*

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Tottenham.

1889 *March* 21.

NILMONY PODDAR AND OTHERS (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT.)*

Sentence—Separate sentences for rioting and grievous hurt—Penal Code, ss. 71, *para.* 1, 144, 147, 148, 324—*Act VIII of* 1882—*Criminal Procedure Code* (*Act X of* 1882), *s.* 35.

Per Curiam (TOTTENHAM, J., dissenting).—Separate sentences passed upon persons for the offences of rioting and grievous hurt are not legal where it is found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under s. 149 of the Penal Code. *Empress* v. *Ram Partab* (1), approved; *Loke Nath Sarkar* v. *Queen-Empress* (2), overruled.

REFERENCE to a Full Bench made by Mr. Justice Mitter and Mr. Justice Macpherson under the following order:—

The question reserved by us in this case is, whether separate sentences passed upon the appellants Nos. 1, 3, 4, and 5 for offences of rioting and hurt are legal.

The finding of the lower Court which we have upheld is that these appellants, who are guilty of rioting, did not individually commit any acts which amounted to voluntarily causing hurt;

* Full Bench on Criminal Appeal No. 78 of 1889, against the judgment of Mr. B. L. Gupta, Officiating Sessions Judge of Farridpore, dated the 8th December 1888.

(1) I. L. R., 6 All., 121.

but they are guilty of that offence, because their co-appellants, Charan and Nobin, with whom they were associated as members of an unlawful assembly, committed certain acts which amounted to voluntarily causing hurt in prosecution of the common object of that assembly. The appellants Nos. 1, 3, 4, and 5 were, therefore, found guilty of the offence of hurt under s. 149 of the Indian Penal Code.

In appeal No. 38 of this year this question arose, and following *Empress* v. *Ram Partab* (1) we held that separate sentences for the two offences are not legal. At that time we were not aware that in *Empress* v. *Loke Nath Sarkar* (2) the contrary view was taken.

We, therefore, refer the following question to a Full Bench: whether separate sentences passed upon appellants 1, 3, 4, and 5 for offences of rioting and hurt are legal, it being found that they individually did not commit any act which amounted to voluntarily causing hurt, but are guilty of that offence under s. 149 of the Indian Penal Code.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.—In the prosecution of the common object of the unlawful assembly, which was to take possession of certain lands, several huts were broken down; one man, Bhagidhar, was badly beaten by one of the rioters not under trial, and by other rioters not identified. Another man, Miajan, was wounded with a spear by one of the accused, and with a lathi by another accused. Force and violence having been used in pulling down the huts and in beating Bhagidhar, the accused have all been found guilty of rioting and sentenced to the full punishment awardable; and the two men who wounded Miajan have also been separately punished for causing hurt to him, but the four other accused, not having individually caused hurt to any one, the question whether they may be separately punished for the hurt has been referred to the Full Bench. It is conceded that all the prisoners were punishable for rioting, and that two of them were separately punishable for the hurt they caused in prosecution of the common object of the riot. If these two, as is conceded, were guilty of an offence punishable separately for the punishment awarded for the riot, all the others are, it is submitted, also punishable in a like manner; for

(1) I. L. R., 6 All., 121. (2) I. L. R., 11 Calc., 349.

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by s. 149 of the Penal Code, if an offence is committed by any member of an unlawful assembly in prosecution of a common object, every member is guilty of that offence. If the offence is separable in the one case, it is a separable offence in the other. Section 71 of the Penal Code does not apply to a case of this nature. Illustration (*a*) to that section shows what was in contemplation by the words "an offence made up of parts." This refers to one offence, in regard to which there can, in the nature of things, be only one trial; as where hurt is caused by several blows with a stick, the several blows make out one offence, and could only be tried and be punishable as one offence. The second illustration applies to the present case. The hurt inflicted on Bhagidhar is no part of the offence against Miajan. Each might have insisted on a separate trial, and although the facts in evidence in the two cases, *viz.*, that the accused took part in the riot, but could not be identified as having struck any particular blow, might be the same, the offences for which they were responsible as rioters would be separate and distinct, and they would be equally responsible to Miajan as to Bhagidhar. Section 35 of the Criminal Procedure Code, which relates to convictions for separate and distinct offences at one trial, governs this case and not s. 71 of the Penal Code.

Rioting is an offence against the public tranquillity, and is dealt with in a different chapter of the Penal Code from offences affecting the human body. Examples of "more offences than one" are given in illustrations (*a*) to (*h*). In s. 235 of the Criminal Procedure Code, illustration (*g*) shows that the offences of rioting and hurt are separate. If they are separate offences, s. 71 of the Penal Code cannot apply to them. The illustration given in *Empress* v. *Ram Partab* (1), as applicable to the first part of s. 71, is not appropriate to that part, but comes under part 3 of that section. A person cannot be punished both for being a member of an unlawful assembly and for riot, because, when force is superadded to the first, it becomes the second, and the combination of unlawful assembly and force constitute a different offence. The illustration regarding the man who holds up his fist, then strikes, and then stabs, is of the same character as the several blows in one beating are one offence; but the causing of grievous hurt to three

(1) I. L. R. 6 All., 121, on p. 124, line 26.

people, which were the facts found in that case, did not culminate in the riot for which the accused was punished. If the riot, on the other hand, culminates in murder, or, as in the above case, in grievous hurt, the rioters become liable, it is submitted, for those separate offences under s. 149. The other cases against my contention followed and accepted the arguments in the above case. They are, however, dissented from in *Queen-Empress* v. *Dungar Singh* (1); *Loke Nath Sarkar* v. *Queen-Empress* (2); *Queen-Empress* v. *Pershad* (3); *Queen-Empress* v. *Sakharam Bhau* (4); *Queen-Empress* v. *Nirichan* (5).

No one appeared for the prisoner.

The following opinions were delivered by the Court (PETHERAM, C.J., MITTER, PRINSEP, WILSON, and TOTTENHAM, JJ.):—

PETHERAM, C.J., MITTER, PRINSEP and WILSON, JJ.—We are of opinion that the questions referred in this case should be answered in the negative.

The appellants Nos. 1, 3, 4 and 5 were found guilty of rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code, and each of them was sentenced to three years' rigorous imprisonment for that offence. Two of their co-appellants, whose appeals are not before us, are found to have committed, in prosecution of the common object of the unlawful assembly of which they were all members, acts which amounted to voluntarily causing hurt under s. 324 of the Indian Penal Code. The appellants Nos. 1, 3, 4 and 5 were, therefore, also found guilty of voluntarily causing hurt under s. 324 of the Indian Penal Code, coupled with s. 149 of the Indian Penal Code. For this offence each of them was sentenced to a further period of rigorous imprisonment for one year. We think that under the first paragraph of s. 71 of the Indian Penal Code these separate sentences are not legal.

Paragraph 1 of s. 71 of the Indian Penal Code is to the following effect:—

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences unless it be so expressly provided."

(1) I. L. R., 7 All., 29.
(2) I. L. R., 11 Calc., 349.
(3) I. L. R., 7 All., 414.
(4) I. L. R., 10 Bom., 496.
(5) I. L. R., 12 Mad., 36.

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In this case the offence of voluntarily causing hurt under s. 324, coupled with s. 149 of the Indian Penal Code, of which these appellants have been found guilty, is primarily made up of two parts, *viz.* : (1) of their being members of an unlawful assembly, by which force and violence was used in prosecution of its common object, and the members of which were armed with deadly weapons; and (2) of the offence of voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, *viz.*, rioting, armed with deadly weapons, under s. 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of s. 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishments for the two offences is illegal under it.

The following cases were cited before us: *Empress* v. *Ram Partab* (1); *Loke Nath Sarkar* v. *Queen-Empress* (2); *Queen-Empress* v. *Dungar Singh* (3); *Queen-Empress* v. *Pershad* (4); *Queen-Empress* v. *Ram Sarup* (5); *Queen-Empress* v. *Sakharam Bhau* (6); *Queen-Empress* v. *Nirichan* (7).

With the exception of the first two, the other cases do not appear to us to be any authority upon the question under our consideration. In some of the Allahabad cases Mr. Justice Brodhurst expressed his opinion upon it; but we do not find that this question legitimately arose in them.

For the reasons set forth above, we agree with the view expressed by Mr. Justice Straight in *Empress* v. *Ram Partab* (1).

The result is that the sentence of one year's rigorous imprisonment passed upon each of the appellants Nos. 1, 3, 4 and 5, under s. 324, coupled with s. 149 of the Indian Penal Code, will be set aside.

(1) I. L. R., 6 All., 121.
(2) I. L. R., 11 Calc., 349.
(3) I. L. R., 7 All, 29.
(4) I. L. R., 7 All., 414.
(5) I. L. R., 7 All., 757.
(6) I. L. R., 10 Bom., 496.
(7) I. L. R., 12 Mad., 36.

TOTTENHAM, J.—In my opinion the separate sentences passed upon the appellants Nos. 1, 3, 4 and 5 for offences under ss. 148 and 324 of the Penal Code are legal. The legality of the convictions is not in dispute before us, and it seems to me that the prisoners are each liable under s. 35 of the Code of Criminal Procedure to receive sentences in respect of each of these offences, unless s. 71 of the Penal Code protects them from being punished for each offence.

Section 71, as amended by Act VIII of 1882, provides for three cases in which the offender shall not be liable to be punished for more than one of two or more offences of which he may have been convicted.

The first clause of that section is the only one that need be considered in this case; for that is the one, if any, which may be applicable to this case.

The first clause then is in these words: "When anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided."

The prisoners have been convicted of offences punishable under ss. 148 and 324 of the Penal Code. It is true that the offence punishable under s. 148 is made up of parts, either of which parts is itself an offence, *viz.*, being a member of an unlawful assembly, armed with a deadly weapon (s. 144), and rioting (s. 147); but s 148 expressly provides a higher punishment than could be awarded for either of those two offences.

The offence under s. 324, of which also the prisoners have been convicted, is not necessarily made up of parts, any of which parts is itself an offence: so that s. 71 does not very clearly affect the liability of the prisoners to be separately sentenced for each offence.

But an opinion has been expressed that, because the conviction of the prisoners of the offence punishable by s. 324 is justified only by the provisions of s. 149, therefore that offence is in this case made up of parts, any of which parts is itself an offence, the parts being offences under ss. 143 to 147 and 148 by the

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prisoners themselves, and an offence under s. 324 committed by another person.

I am unable to adopt this view. I could perhaps do so if s. 149 defined and made punishable any specific offence; but it does not do this. It simply declares that under certain circumstances every person, who is a member of an unlawful assembly, is guilty of the offence committed by some other member of it, whatever that offence may be; and, if he is guilty, I apprehend he is liable to be punished for it.

He is not convicted of an offence punishable under s. 149, but of an offence punishable under whatever section such offence is made punishable. Section 149 simply makes the participators in an unlawful assembly equally liable with the actual perpetrator for any offence committed by him in prosecution of the common object.

The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits; and if such further offence is committed in prosecution of the common object of the rioters, s. 149 declares that each one of these is guilty, notwithstanding that he did not do the act or abet it. It places each member of the unlawful assembly in the same position as the actual perpetrator of the further offence. This seems to me to be the plain meaning of the law, and I cannot agree in holding that the offence punishable under s. 324 is made up of several parts upon the ground that it is s. 149 which declares the guilt of the prisoners.

I think the sentences passed are legal.

T. A. P. *Sentence varied.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

BIR CHUNDER MANIKYA (PLAINTIFF) *v.* RAJ MOHUN GOSWAMI AND OTHERS (DEFENDANTS).*

1889 *January* 15.

Limitation Act, 1877, *Art.* 130—*Suit for assessment of rent on lakheraj land after decree for resumption—Effect of decree as creating or not relationship of landlord and tenant.*

The plaintiff brought a suit in 1861 against *C* for resumption of, and for declaration of his right to assess rent upon, *C's* lands within his zemindari which *C* held as *lakheraj*. That suit was presumably instituted under Regulation II of 1819, s. 30, which related only to resumption of *lakheraj* lands existing prior to 1790, but there was nothing to show conclusively under what law it was instituted, or whether the *lakheraj* grant was one subsequent or anterior to 1790. In that suit an *ex parte* decree was passed in 1863 that "the suit be decreed, and the land in dispute be declared to be *shukur*," *i.e.*, liable to assessment. In a suit brought in 1886 against the representatives of *C*, after serving a notice upon them to pay rent for the land at a certain rate, to assess the land at the rate mentioned in the notice, and for the recovery of rent at that rate: *Held* that the decree of 1863 had not the effect of creating the relationship of landlord and tenant between the parties, and therefore the suit, not having been brought within 12 years from the date of that decree, was barred by art. 130 of the Limitation Act XV of 1877.

THIS was a suit for assessment of rent on certain lands which the predecessor of the defendants had held as *lakheraj* lands, but which had been declared liable to assessment by an *ex parte* decree, dated the 14th January, 1863, which, as the plaintiff claimed, had the effect of establishing the relationship of landlord and tenant between himself and the defendants.

The defence (so far as it is material to this report) was that the decree passed in 1863 had not the effect ascribed to it by the plaintiff, and that the suit was consequently barred by lapse of time. Both the lower Courts decided in favor of the defendants, and the plaintiff appealed to the High Court.

Mr. *P. O'Kinealy* and Baboo *Srinath Banerjee* for the appellant.

* Appeal from Appellate Decree No. 2231 of 1887, against the decree of Baboo Nil Madhub Bundopadhya, Subordinate Judge of Tipperah, dated the 2nd of July 1887, affirming the decree of Baboo Chunder Prosunno Dutt, Munsiff of Commilla, dated the 14th of March 1887.

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Baboo *Akhoy Coomar Banerjee*, and Baboo *Gobind Chunder Doss* for the respondents.

The following cases were cited: *Sonatun Ghose* v. *Abdool Farrar* (1), *Madhusudan Sagory* v. *Nipal Khan* (2), *Saudamini Debi* v. *Sarup Chandra Roy* (3), *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (4), and *Nilkomul Chuckerbutty* v. *Bir Chunder Manikya*, Special Appeal No. 1605 of 1885 decided on the 13th May, 1886 (5).

(1) B. L. R., Sup. Vol., 109; 2 W. R., 91.
(2) 8 B. L. R., Ap, 87 (note); 15 W. R., 449.
(3) 8 B. L. R., Ap., 82; 17 W. R., 363.
(4) 2 C. L. R., 569.
(5) *Before Mr. Justice Mitter and Mr. Justice Grant.*

NIL KOMUL CHUCKERBUTTY AND OTHERS (DEFENDANTS) *v.* BIR CHUNDER MANIKYA (PLAINTIFF).*

Limitation Act, 1877, Art. 130—Suit for assessment of rent on lakheraj land after decree for resumption—Effect of decree as creating or not relationship of landlord and tenant.

The plaintiff in 1862 obtained a decree for resumption of land held under an invalid *lakheraj* title created before 1790, the decree declaring the land liable to assessment. In a suit brought more than twelve years after the decree against the representatives of the defendant in the suit of 1862 to assess the land: *Held*, that the decree of 1862 did not create the relationship of landlord and tenant between the parties, and that the suit was, therefore, barred under Art. 130 of the Limitation Act XV of 1877.

THE facts of this case are sufficiently stated in the judgment.

Baboo *Troyluckonath Mitter* and Baboo *Golap Chunder Sircar* for the appellants.

Baboo *Rutnessur Sen* (for Baboo *Kali Mohun Das*), and Baboo *Durga Mohun Das* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

This is a suit brought by the plaintiff to assess certain lands, which were declared by a decree of 1862 to be liable to assessment as invalid *lakheraj*. One of the objections taken by the defendants in this Court, as well as in the lower Courts, is that the suit is barred by limitation. Another point urged here is that one of the defendants in that suit, *viz.*, Prosunno Coomar Chuckerbutty, was a minor at the time when the decree was passed, and that he was not represented by his guardian. As we think that upon the first point taken, namely, the point of limitation, the defendants appellants

*Appeal from Appellate Decree, No. 1605 of 1885, against the decree of Baboo Kali Dass Dutt, Subordinate Judge of Tipperah, dated the 22nd of April 1885, reversing the decree of Baboo Gour Chunder Ray, Munsiff of Kushtia, dated the 28th of April 1884.

The facts and arguments are sufficiently stated in the judgment of the Court (PRINSEP and GHOSE, JJ.) which was as follows :—

The question involved in this appeal is one of limitation under art. 130 of the second schedule of Act XV of 1877; and it arises in this way :—

The plaintiff, who is the zemindar of Chuckla Rashinabad, instituted a suit on the 28th of December 1861 against one

are entitled to succeed, it is unnecessary to express any opinion upon the other point.

Now, to a suit of this kind, art. 130 of the second schedule of the Limitation Act applies. That article says that in a suit for the resumption or assessment of rent-free land the period of limitation is twelve years from the date when the right to resume or assess the land first accrues. The right to assess accrued in this case in the year 1862, when the resumption decree was passed, and the present suit having been brought more than twelve years from that date is barred. But it has been contended on behalf of the respondent that that article does not apply, because in this case the decree in 1862 established a relationship of landlord and tenant between the plaintiff and the predecessor in title of the defendants. If that were so no doubt it would be an answer to the contention of the appellants that the suit is barred by limitation under art. 130. Now what has been settled by authorities on this point is this, that the mere mention of s. 30, Regulation II of 1819, is not conclusive, although that section only refers to the resumption of invalid *lakheraj* lands created before the 1st December 1790, that is, although on the face of the decree it appeared that that section was mentioned, yet the suit was really a suit for assessment of rent upon land alienated from the *mal* estate after the 1st December 1790, and that the decree established a relationship of landlord and tenant between the person in whose favor the decree was passed and the person against whom it was passed. If that is not established, then it would be taken to be a decree for resumption of invalid *lakheraj* lands under s. 6, Regulation XIX of 1793. In this case the decree has been placed before us, and we cannot say that it is shown thereby that, although it purports to have been based upon s. 30, Regulation II of 1819, yet it was really a decree for assessment of *mal* land. That being so, we must take it that the decree of 1862 was a decree for resumption of land held under an invalid *lakheraj* title created before the 1st December 1790. For assessment of such lands, the procedure laid down in s. 9, Regulation XIX of 1793, has first to be adopted by the zemindar. The last part of that section says: "If the proprietor shall agree to pay the revenue required of him, he and his heirs and successors shall hold the lands as a dependent taluk, subject to the payment of such fixed revenue for ever." But that section does not provide for a case where the proprietor, that is to say, the *lakheraj*-

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Choituno Mohun Adhicary in the Collector's Court for the purpose of resuming, and for having his right declared to assess rent upon, certain lands within the ambit of his zemindari which he, the defendant, held as *lakheraj*. It does not appear from the decree pronounced in that suit, and which we may here mention is the only proceeding before us in connection with it, whether it was a suit under the provisions of s. 30, Regulation II of 1819, or s. 28, Act X of 1859, or under any other law; but we have it that subsequently to the passing of Bengal Act VII of 1862, which provided for the transfer of suits instituted under s. 30, Regulation II of 1819, from the Collector's Court to the Civil Court, that suit was transferred from the Collector's to the Civil Court; and there can be little doubt that, as this transfer was made immediately after the passing of that Act, and no special reason is assigned for its transfer, it was made in consequence, and that, therefore, the suit had been brought under s. 30, Regulation II of 1819. And we may here observe that if it had been a suit under Act X of 1859, there

dar, refuses to pay the revenue required of him. It is clear that in a case of that description the zemindar must proceed by a regular suit to assess the land according to the provisions of s. 8, Regulation XIX of 1793. To a suit of that description, art. 130 of the Limitation Act would apply. In this case there is nothing to show that the plaintiff first proceeded under s. 9, Regulation XIX of 1793, and that then finding that the *lakherajdar* did not agree to pay the revenue assessed upon the land, he was compelled to bring this regular suit. But it is clear from the proceedings in the lower Court that the defendants would not consent to pay any revenue at all. Their contention was that the suit is barred. It is, therefore, quite unnecessary to require the plaintiff to proceed first according to the direction contained in s. 9, Regulation XIX of 1793. We may take it that the *lakherajdars*, the defendants, would refuse to pay the revenue that might be assessed on their lands under the provisions of Regulation XIX of 1793. That being so, the simple question is whether the present suit is barred under art. 130 of the Limitation Act. I have already pointed out that, unless the decree of 1862 established a relationship of landlord and tenant, the present claim would be barred. It has been already shown that that decree does not go to establish that point in favor of the plaintiff. The suit is, therefore, barred by the limitation prescribed by art. 130.

We accordingly reverse the decree of the lower Appellate Court and dismiss the suit with costs.

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was nothing to prevent the Collector from proceeding with it. In the Full Bench case of *Sonatun Ghose* v. *Abdool Farrar* (1), the majority of the Judges who constituted that Bench held that s. 30, Regulation II of 1819, related only to resumption of *lakheraj* existing prior to 1790. And if this suit be regarded as one brought under that law, it would seem that it was barred under the law of limitation then in force (XIV of 1859, s. 14). But however that may be, an *ex parte* decree was passed in January 1863 in these words: "The suit be decreed, and the land in dispute be declared to be *shukur*." These words, taken with the recitals of the claim given in the decree, mean, as we take it, that the prayer for resumption of the *lakheraj* be allowed, and the lands be declared liable to pay revenue or rent, as the case might be, with reference to the grant set up being either anterior or posterior to December 1790.

Nothing was done in furtherance of that decree, until the year 1886, when a notice was served by the zemindar upon the defendants, who are the representatives of Choituno Mohun Adhicary, calling upon them to agree to hold the lands at a certain jumma; and he subsequently brought the present suit on the 12th of July 1886 for the purpose of assessing the lands at the rate mentioned in the notice, and for recovery of rent at that rate.

This suit has been dismissed by both the lower Courts as barred by limitation.

The main contention that was raised before us by Mr. O'Kinealy, the learned Counsel for the appellant, was that, although more than 12 years have elapsed from the date of the decree of 1863, still no limitation would apply, because the effect of the decree was to re-annex the land that had been improperly alienated after 1790 to the *mal* estate of the zemindar, and to create between the parties the relationship of landlord and tenant. Mr. O'Kinealy further contended that the land having been already declared to be *mal*, art. 130 of the Limitation Act had no application. And he relied upon the rulings of this Court in *Madhusudan Sagory* v. *Nipal*

(1) B. L. R., Sup. Vol., 109; 2 W. R., 91.

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Khan (1), *Saudamini Debi* v *Sarup Chandra Roy* (2), and *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (3).

The validity of the contention raised before us depends entirely upon what may be the true interpretation and effect of the resumption decree passed in January 1863. That decree, as already mentioned, does not show under what law it was passed, nor is there anything stated in it as to whether the grant set up by the *lakherajdars* was a grant subsequent or anterior to December 1790. Unless this be shown, we cannot say that the effect of the decree was to establish, as contended for the appellant, the relationship of landlord and tenant between the parties. It has been held in certain cases by this Court that a decree for resumption of a *lakheraj* grant before December 1790 does not by itself create such a relation; that it is after the decree has been followed up by a proceeding assessing the revenue payable by the *lakherajdar*, and when the latter agrees to pay the revenue assessed, that such a relationship is created; while in the case of a grant subsequent to the year 1790, the decree declaring the zemindar's right to assess rent does establish such a relation. See *Madhub Chandra Bhadory* v. *Mahima Chandra Mazumdar* (4), and *Shamasunderi Debi* v. *Sital Khan* (5).

Taking the law as thus laid down we think that, in the absence of anything being shown by the plaintiff as to the law under which the above decree was passed, and whether the alienation was anterior or subsequent to the year 1790, we cannot say for him, upon the bare words of the decree, that it established the relationship of landlord and tenant; while, on the other hand, the fact of the suit being transferred after the passing of Bengal Act VII of 1862 from the Collector's to the Civil Court indicates to our mind that it was a suit under s. 30, Regulation II of 1819, which related to the resumption of grants made before the year 1790. If the alienation was made before that year, there can be no doubt that the decree was in respect of

(1) 8 B. L. R., Ap., 87 (note); 15 W. R., 440.
(2) 8 B. L. R., Ap., 82; 17 W. R., 363.
(3) 2 C. L. R., 569.
(4) 8 B. L. R., Ap., 83 (note); 12 W. R., 442.
(5) 8 B. L. R., Ap., 85 (note); 15 W. R., 474.

lands falling within s. 6, Regulation XIX of 1793, and it follows that the zemindar was bound to have adopted the procedure laid down by ss. 8 and 9, Regulation XIX of 1793, for the assessment of revenue upon those lands. And if this had been done, the relationship of landlord and tenant would have been established between the parties. But so far as the words of the decree of 1863 are concerned, they merely amount to this, that the *lakheraj* is not a valid one, and that the lands are liable to pay revenue or rent, as the case might be. It does not declare that the lands belong to the *mal* estate of the zemindar.

If this decree did not establish the relationship of landlord and tenant, and if it did not declare that the lands were the *mal* land of the zemindar, it seems to us to be clear that the plaintiff was bound to have brought his suit within twelve years from the date thereof for the assessment of the lands.

As to two of the cases relied upon by Mr. O'Kinealy, *viz.* *Madhusudan Sagory* v. *Nipal Khan* (1) and *Saudámini Debi* v. *Sarup Chandra Roy* (2), we may observe that the question of limitation was not raised in either of them; and there is nothing in those decisions, as we understand them, which militates against the view we have expressed. It was no doubt laid down in the first of these two cases that, in regard to decrees passed before the Full Bench decision in the case of *Sonatun Ghose* v. *Abdool Farrar* (3), it could not be said that merely because the procedure laid down in s. 30, Regulation II of 1819, was followed, it must be inferred that the grant was anterior to December 1790. But it is to be observed that it was found in the judgment delivered in the resumption case, which was before the Judges in the above case, that the defendant had failed to prove that the *lakheraj* existed prior to 1790; while so far as the resumption decree with which we are concerned, there was no such finding: and, in the second place, as already remarked, there are other facts before us which lead us to infer that the grant which was the subject-matter of the decree of 1863 was one anterior to 1790.

(1) 8 B. L. R., Ap., 87 (note); 15 W. R., 440.
(2) 8 B. L. R., Ap., 82; 17 W. R., 363.
(3) B. L. R., Sup. Vol., 109; 2 W. R., 91.

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As regards the other case relied upon by Mr. O'Kinealy, *viz.*, *Protap Chunder Chowdhry* v. *Shukhee Soondaree Dassee* (1), it is sufficient to state that the judgment proceeds mainly upon the construction which the learned Judges put upon the resumption decree that was before them. That decree was construed to have the effect of declaring "that the land in the possession of the defendant had been part of the permanently-settled estate, and had been separated by an invalid grant, and thereon to resume the same and re-annex the land to the zemindar's estate." We have not before us the terms of the decree in that case, nor do we know what were the facts from which this construction was arrived at. The terms of the decree in the suit of 1886, now before us, do not however enable us to come to the same conclusion.

Our attention has been called by the learned vakeel for the respondent to an unreported decision by another Divisional Bench of this Court (Mitter and Grant, JJ.) in second appeal No. 1605 of 1885, decided on the 13th May 1886, which altogether supports the view adopted by the lower Appellate Court, holding that the plaintiff's claim was barred under art. 130 of the Limitation Act. The facts of that case were very similar to this, and we may say that we quite concur in that ruling.

The appeal will accordingly be dismissed with costs.

Appeals Nos. 2219, 2230, 2233 will be governed by the decision in No. 2231. And so far as the latter of these cases is concerned, it being found that the predecessor of the present defendant was no party to the resumption decree, there can be no question whatever that the plaintiff's suit is barred by limitation. These appeals are accordingly dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) 2 C. L. R., 569.

Before Mr. Justice Pigot and Mr. Justice Beverley.

GOKUL KRISTO CHUNDER (JUDGMENT-DEBTOR) *v.* AUKHIL CHUNDER CHATTERJEE (DECREE-HOLDER).° 1889 *February 7.*

IN THE MATTER OF THE PETITION OF ISHAN CHUNDER DAS (DECREE-HOLDER).

RASHARAJ BOSE AND OTHERS (JUDGMENT-DEBTORS), *v.* GOBINDA RANI CHOWDHRANI (DECREE-HOLDER).†

MOOLA KUMARI BIBEE (DECREE-HOLDER) *v.* MOOL CHAND DHAMANT AND ANOTHER (JUDGMENT-DEBTORS), AND

BISSUN CHAND DOODHURIA (DECREE-HOLDER) *v.* MOOL CHAND DHAMANT AND ANOTHER (JUDGMENT-DEBTORS.)‡

Execution of decree—Transfer of decree for execution—Jurisdiction—Civil Procedure Code (Act XIV of 1882) *ss.* 6 *and* 223.

Having regard to the provisions of s. 6 of the Code of Civil Procedure, a Civil Court has no jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code, when the decree has been passed in a suit the value or subject-matter of which is in excess of the pecuniary limits of its ordinary jurisdiction. *Narasayya* v. *Venkata Krishnayya* (1) dissented from

Sidheshwar Pandit v. *Harihar Pandit* (2), *In re Balaji Ranchoddas* (3), and *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4), referred to.

Appeal No. 284 *of* 1888.

THIS was an appeal from an order of the 16th July 1888, of the District Judge of Burdwan, affirming the order of the Munsiff of Cutwa, dated the 12th May 1888.

A decree of the High Court in its Ordinary Original Civil Jurisdiction had been sent to the Munsiff of Cutwa for execution. The application of the judgment-creditor for execution was objected to by the judgment-debtor on the ground that the Munsiff had no jurisdiction to execute the decree, inasmuch as it

° Appeal from Order No. 284 of 1888, against the order of F. B. Taylor, Esq., Judge of Burdwan, dated the 16th of July 1888, affirming the order of Baboo Raj Narain Chuckerbati, Munsiff of Kutwa, dated the 12th of May 1888.

† Civil Rule No. 1032 of 1888, against the order passed by Baboo Upendra Nath Bose, Munsiff of Munshigunge, dated the 28th of April 1888.

‡ Civil reference No. 8A. of 1888, made by Baboo Nobin Chunder Ganguli, Judge of the Small Cause Court, Berhampore, dated the 10th of April 1888.

(1) I. L. R., 7 Mad., 397.
(2) I. L. R., 12 Bom., 155.
(3) I. L. R., 5 Bom., 680.
(4) I. L. R., 8 Calc., 51.

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had been passed in a suit, the value or amount of the subject-matter of which was in excess of the pecuniary limits of his ordinary jurisdiction. The Munsiff overruled the objection and ordered execution. On appeal, the District Judge upheld the order of the Munsiff on the authority of the case of *Narasayya* v. *Venkata Krishnayya* (1).

The judgment-debtor appealed to the High Court.

Civil Rule No. 1032 *of* 1888.

This was a rule on the judgment-debtors and the decree-holder, Govinda Rani Chowdhrani, to show cause why an order of the Second Munsiff of Munshigunge, dated the 28th April 1888, allowing Govind Rani to participate in the assets to be realized in execution of the petitioner's decree, should not be set aside.

The facts of the case in which this rule was issued were as follows:—

A decree for Rs. 853 was made in favor of the petitioner, Ishan Chandra Das, by the Munsiff of Patuakali, on 17th February 1879. This decree was transferred to the Second Munsiff of Munshigunge for execution, and on the 27th October 1887, certain of the judgment-debtor's property within his jurisdiction was attached, and on the 12th March sold for Rs. 300. On the 7th March 1888, five days before the sale, Govinda Rani Chowdhrani who, with others, on the 6th April 1877, had obtained a mortgage decree against the same judgment-debtor for upwards of Rs. 11,000 in the Court of the First Subordinate Judge of Dacca, applied to that Court to send the decree to the Munsiff of Munshigunge for execution. The application was granted, and on the 11th March 1888, Govinda Rani applied to the Munsiff for execution, and for a rateable distribution of sale proceeds in execution of the petitioner's decree under s. 295 of the Civil Procedure Code. On the 14th April the petitioner objected to this application; but the Munsiff overruled the objection, and by his order, dated the 28th April 1888, directed a rateable distribution of the sale proceeds. Against this order, on the 2nd August 1888, the petitioner moved the High Court on the ground, *inter alia*, that Govinda Rani's decree, being for a sum of over Rs. 11,000, must presumably have been made in a suit which the

(1) I. L. R. 7 Mad., 397.

Munsiff would have had no jurisdiction to try, and that, therefore, the Munsiff was not competent to execute the decree or to make any order respecting it under s. 295 of the Code, and a rule was issued in the above terms.

Civil Reference No. 8*A of* 1888.

This was a reference to the High Court from the Small Cause Court at Berhampore.

The facts of the case in which the reference was made were these: The Judge of the Small Cause Court at Berhampore was also the Subordinate Judge of Moorshedabad. On the 4th January 1888, Moola Kumari Bibee obtained a decree against Mool Chand Dhamant and another in the Small Cause Court at Berhampore. In execution of her decree, she attached the moveable properties of the judgment-debtors on the 20th January 1889. The properties were sold on 9th March 1889; prior to the sale, on the 2nd March, Rai Bissun Chand Doodhuria Bahadoor, who had, on the 28th January 1889, obtained a decree for Rs. 3,209 against the same judgment-debtor in the Court of the Subordinate Judge of Moorshedabad, applied to that Court to send the decree to the Small Cause Court at Berhampore for execution. The application was granted; and on 7th March Rai Bissun Chand applied to the Judge of the Small Cause Court for execution, and for a rateable distribution of the sale proceeds under s. 295 of the Civil Procedure Code. Moola Bibee met the application with the objection, amongst others, that inasmuch as the Judge of the Small Cause Court had no jurisdiction to try the suit, he was not competent to execute the decree. The Judge made an order for rateable distribution contingent on the opinion of the High Court.

In Appeal No. 284 of 1888,—

Baboo *Karuna Sindhu Mukerjee* for the appellant.

Baboo *Benode Behari Mukerjee* for the respondent.

In Rule No. 1032 of 1888,—

Baboo *Hurri Mohun Chuckerbutty* for the petitioner.

Baboo *Lal Mohun Das* for the opposite parties.

In Reference No. 8A of 1888,—

Baboo *Srinath Das* for the decree-holders.

Baboo *Kali Kissen Sen* for the judgment-debtors.

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The following judgments were delivered by the High Court (PIGOT and BEVERLEY, JJ.)

BEVERLEY, J.—In these three cases the question raised is practically one and the same. It may be broadly stated thus: Has a Civil Court jurisdiction to execute a decree sent to it for that purpose under s. 223 of the Code when that decree has been passed in a suit the value or amount of the subject-matter of which was in excess of the pecuniary limits of its ordinary jurisdiction?

[The judgment here set out the facts in the three cases and then proceeded.]

In all three cases, therefore, the point is virtually the same: namely, whether under s. 223 of the Code a decree can be sent for execution to, and can be executed by, a Court which, as regards its pecuniary jurisdiction, was not competent to make the decree.

On the one side, it is contended that s. 223 contains no limitation as regards the pecuniary jurisdiction of the Court to which a decree may be sent for execution, similar to that contained in s. 25; that by s. 28 the Court to which a decree is sent for execution is expressly vested with the same powers in executing it as if the decree had been passed by itself; that if there is any force in the limitation sought to be imposed, the provisions of s. 295 regarding the rateable distribution of assets would, in many cases, be unfairly restricted in their operation. And we have been referred to the case of *Narasayya* v. *Venkata Krishnayya* (1) in which Turner, C.J., and Muttasami Ayyar, J., held that s. 223 gave an extraordinary jurisdiction to a Court to execute a decree in a suit beyond its pecuniary jurisdiction sent to it for execution.

On the other hand, it is said that the proceedings in execution are merely a continuation of the suit, and that a Court, which has no jurisdiction to try the suit, can have no jurisdiction to execute a decree made in that suit. And in support of this view, the case of *Shri Sidheshwar Pandit* v. *Shri Harihar Pandit* (2) decided by Sargent, C.J., and Nanabhai Haridas, J., has been cited before us.

(1) I. L. R., 7 Mad., 397. (2) I. L. R., 12 Bom., 155.

It appears, therefore, that the Madras and Bombay authorities are opposed to each other on this point. The point is one of some importance, but it would seem that no decision of this Court upon it is to be found in the reports.

The question turns to some extent upon the Civil Courts Acts, which prescribe the pecuniary jurisdiction of the various Civil Courts. And it may be pointed out here that, whereas the Madras and Bombay Civil Courts Acts (Act III of 1873, s. 12, and Act XIV of 1869, s. 24) speak of the jurisdiction of the Courts in "*suits and proceedings*" of a civil nature, the Bengal Civil Courts Act refers to "*suits*" only. The distinction is probably unimportant, and, in fact, it appears that, in the report of the Madras case referred to, the words "*suits and applications*" are quoted by some mistake as being the words used in the Madras Act instead of the words "*suits and proceedings.*"

The Madras decision proceeds upon the principle that s. 223 of the Code confers an extraordinary jurisdiction which is limited by no restriction such as is to be found in s. 25.

We are of opinion that we ought not to follow that decision.

It seems to us that the learned Judges who decided that case overlooked the provisions of s. 6 of the Code of Civil Procedure, which appears to contain words which, we think, were expressly intended to limit the jurisdiction which would otherwise be given by s. 223. We are also of opinion that there are other indications in the Code going to show that, as Sargent, C.J., said in the Bombay case, a Court which could not have entertained the suit is incompetent to deal with it in execution.

The last clause of s. 6 runs as follows: "Nothing in this Code shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

It is contended that the word "*suits*" in this clause must be limited to proceedings in the cause up to the passing of the decree, and that it does not, therefore, operate to curtail the power of a Court to execute a decree. We see no sufficient reason for giving the word this restricted meaning. On the other hand, there would appear to be several weighty reasons for assigning it a

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wider signification so as to cover all proceedings in a suit, including the proceedings in execution.

By s. 9 the Code is divided into ten parts, the first of which treats of *suits in general*. It is important to observe that that part of the Code contains the rules relating to the execution of decrees (Chap. XIX). So far as it goes, this circumstance seems to show that the framers of the Code regarded the proceedings in execution as a part of the suit.

In s. 3, moreover, we find proceedings up to decree and proceedings after decree equally referred to as being proceedings in the suit.

Again, if the words "jurisdiction over suits" in s. 6 are to be limited to the institution and hearing of causes up to decree only, it is difficult to conceive any case to which the clause in question would apply. We have been unable to discover any provision in the Code which could, if uncontrolled by this clause, have operated to give a Court jurisdiction to try a suit in excess of the limits of its pecuniary jurisdiction. Chapter II contains the rules as to the Court in which a suit is to be brought: and it will be seen that in almost every section in that chapter the pecuniary jurisdiction of the Court is expressly or impliedly referred to. (See ss. 15, 16, 17, 19 and 25).

On the other hand, s. 223, if uncontrolled by s. 6, gives to a Court a very wide—in fact a practically unlimited—jurisdiction in many important matters in respect of suits, the amount or value of the subject-matter of which may exceed the pecuniary limits of its ordinary jurisdiction.

By s. 228, the Court executing a decree sent to it has the same powers in executing the decree as if it had been passed by itself, * * * * and its order in executing such decree is made subject to the same rules in respect of appeal as if the decree had been passed by itself.

Accordingly, if the decree of a District or Subordinate Judge can be sent to a Munsiff for execution, the Munsiff has jurisdiction to try all questions relating to the execution of the decree (*e.g.*, limitation, claims to attached property, complaints of resistance or obstruction, and generally all questions under s. 244), and the appeal from his orders would lie in every case to the District Judge,—no matter

what might be the value of the suit. As Westropp, C.J., remarked in *Balaji Ranchoddas* (1), questions arising in the execution of decrees are frequently quite as important as the questions in issue in suits and appeals, and there would seem to be no reason why the limitation of jurisdiction thought necessary in respect of hearing the original suit should not be also necessary in respect of trying questions relating to the execution of the decree.

There are other considerations which go to bear out the view that the jurisdiction conferred by s. 223 must be considered as qualified by the last clause of s. 6.

Section 223 itself contains a clause empowering the Courts of Small Causes at Calcutta, Madras, Bombay, or Rangoon, to execute decrees sent to them in certain cases, but such a decree must have been passed in a case cognizable in a Court of Small Causes, or, as Act VII of 1888 more clearly puts it, "in a suit of which the value, as set forth in the plaint, did not exceed two thousand rupees, and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes." In other words, we have here a distinct recognition of the rule, which appears to be contained in s. 6, that no Court can execute a decree passed in a suit, the value of the subject-matter of which would have been in excess of its pecuniary jurisdiction.

Section 649 refers to a case in which a Court, which passed a decree, may have ceased "to exist or to have jurisdiction to execute it." The use of these words in the Code seems to imply that the jurisdiction of a Court in the execution of decrees is subject to limitation, and that it is not competent to every Court to execute the decree of another Court that may be sent to it for that purpose.

The last clause of s. 6 was first introduced into the Code of 1877. But the Code of 1859 everywhere assumes that the power to execute a decree is not a power possessed by all Courts indiscriminately, but is subject to restrictions of jurisdiction. That Code speaks of the Court "*whose duty it is to execute the decree*" (see ss. 206, 207, 285). That Court need not necessarily be the Court which passed the decree (s. 206), but it must be a

(1) I. L. R., 5 Bom., 680.

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Court having jurisdiction to execute it, and by s. 287 that Court must apparently be either the principal Civil Court of original jurisdiction in the district," or " any Court subordinate thereto to which it may entrust the execution of the decree."

In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), their Lordships of the Privy Council said: "It appears to their Lordships that an application for the execution of a decree is an application in the suit in which the decree was obtained." This and similar remarks which are to be found elsewhere support the view that the proceedings in a "suit" do not necessarily terminate with the decree, but that the word "suit" may fairly be interpreted to include the proceedings taken to execute the decree. If this be so, it follows that s. 6 must operate to limit the jurisdiction conferred by s. 223. We are of opinion that it does so operate, and that these cases ought to be decided accordingly.

The rule will accordingly be made absolute with costs. The appeal from Order No. 284 will be allowed with costs, the order of the lower Courts being set aside. And the reference will be answered in the terms of this judgment.

PIGOT, J.—I am of the same opinion. In the judgment which has been just read, an argument adduced by the learned pleader, Babu Lal Mohan Das, has not been mentioned by us, and we think it is well to add these words of reference to it. That argument was used as an answer to the objections referred to in our judgment as to allowing Courts of inferior jurisdiction to deal with questions of great amount or great importance, and it was suggested that s. 239 meets that difficulty by providing for recourse to the Court making the decree in certain cases. That suggestion is, however, met by the observation that the power of having recourse to the Court granting the decree given by that section is limited to the judgment-debtor. We think that disposes of that argument.

Appeal allowed and Rule made absolute.

C. D. P.

(1) L. R., 8 Calc., 51; L. R., 8 I. A., 123.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

DURGA CHARAN MOJUMDAR (DECREE-HOLDER) *v.* UMATARA GUPTA (JUDGMENT-DEBTOR).* 1889 *February* 21.

Execution of decree—Transfer of decree for execution—Civil Procedure Code, 1882, s. 223.

Section 223 of the Code of Civil Procedure, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to *another Court*, should be interpreted to mean another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction.

Narasayya v. *Venkata Krishnayyar* (1), dissented from.

THE facts as stated by the lower Appellate Court were as follows:—

"Umatara Gupta obtained a decree for about Rs. 500, against one Rajoni Kanta Sen, in the Subordinate Judge's Court, at Commillah. About the same time Rajoni Kanta obtained a decree for about Rs. 800, against Umatara, in the Court of the First Munsiff of Muradnagor. Rajoni subsequently sold his decree to Durga Charan Mojumdar. When execution of the larger decree was taken out in the Munsiff's Court by the then decree-holder, Durga Charan Mojumdar, Umatara Gupta applied to have her own decree set off against that which was sought to be executed. Her application was rejected by the Munsiff on the ground of want of the necessary certificate under s. 224 of the Civil Procedure Code from the Court (that of the Subordinate Judge) which had passed the decree. On appeal to this Court the Munsiff's order was affirmed. Umatara Gupta then applied to the Subordinate Judge for the necessary certificate under s. 224, which she obtained and duly filed in the Munsiff's Court: this was on the 16th February 1888. The Munsiff deferred consideration of the petition until the 9th April, the date fixed for the sale of Umatara Gupta's attached property, and on that date he

* Appeal from Order No. 416 of 1888, against the order of D. Cameron, Esq., Judge of Tipperah, dated the 30th of June 1888, reversing the order of Baboo K. D. Chowdhry, Munsiff of Muradnagor, dated the 9th of April 1888.

(1) I. L. R., 7 Mad., 397.

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passed an order rejecting her application for set-off, on the ground that her judgment-debtor was Rajoni Kant Sen, and not Durga Charan Mojumdar, the transferee of the decree under execution."

The Judge reversed the decision of the Munsiff, and directed that "the set-off applied for be allowed."

From this order Durga Charan Mojumdar appealed to the High Court on the ground, among others, that the Subordinate Judge had no power to transfer the decree to the Munsiff for execution.

Baboo *Okhoy Coomar Banerjee* for the appellant.

Baboo *Rajendro Nath Bose* for the respondent.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

The matter for our decision in this appeal is whether the Munsiff was competent to execute a decree transferred to him by the Subordinate Judge who passed it.

It appears that the appellant obtained a decree from the Munsiff which he put into execution. Another decree had been obtained against him, or rather against his assignor, in the Court of the Subordinate Judge, and the decree-holder thereupon obtained an order from the Subordinate Judge to transfer the decree by an order under s. 223 to the Court of the Munsiff, in order that it might be set off as a cross-decree. The sole question submitted for our decision is whether such an order can be passed by the Subordinate Judge so as to give the Munsiff jurisdiction. The terms of s. 223, standing by themselves, are sufficiently wide to permit this, but we think that they should be read with the other portions of the Code which restrict their application. Section 6 of the Code declares that "nothing in this Code affects the jurisdiction or procedure, or shall operate to give any Court jurisdiction over suits of which the amount or value of the subject-matter exceeds the pecuniary limits (if any) of its ordinary jurisdiction." Now all matters relating to execution of decrees are regarded as proceedings in a suit, and the chapter relating to matters in execution forms portion of Part I of the Code which is entitled "Of suits in general." We may also refer to the well-known case of *Mungul Pershad Dichit* v. *Grija*

Kant Lahiri (1) in which their Lordships of the Privy Council expressed themselves in a similar manner. Section 246 of the Code, Explanation I, relating to the execution of cross-decrees, is also important in this respect. It declares that the decrees contemplated by that section are decrees capable of execution at the same time and by the same Court. These expressions, in our opinion, seem to indicate a limitation in respect to the powers of execution by Courts of inferior jurisdiction. In respect to s. 223, we may also observe that the Court of the Munsiff, although inferior to the Court of a Subordinate Judge, is not, within the terms of s. 2, subordinate thereto. The definition of "District Court," as therein given, seems to contemplate that all Courts within a district are subordinate to the District Court, that is to say, the principal Civil Court of Original Jurisdiction, rather than to the Court of the Subordinate Judge, which is a Court generally having concurrent original jurisdiction with a District Court. We accordingly hold that s. 223, which declares that the Court which passes a decree may, on the application of the decree-holder, send it for execution to *another Court*, should be interpreted to mean another Court having jurisdiction and competent to execute that decree, having regard to the amount or value of the subject-matter of its ordinary jurisdiction. We have considered the case of *Narasayya* v. *Venkata Krishnayya* (2), but we are unable to concur in the opinion expressed by the learned Judges of the Madras Court. We have been referred to a case decided by another Division Bench of this Court (Pigot and Beverley, JJ.), on the 7th instant—*Gokul Kristo Chunder* v. *Akhil Chunder Chatterjee* (3)—in which the view taken of the decision of the Madras Court coincides with that we now express. The respondent is not without remedy in obtaining a set-off for the amount of his decree against the decree now under execution against him, provided he can satisfy any objections that may be raised as to a set-off being no longer allowable by reason of the assignment. He can, if so advised, apply to the District Court under s. 25 for the transfer of the decree

(1) I. L. R., 8 Calc., 51; L. R., 8 I. A., 123.
(2) I. L. R., 7 Mad., 397.
(3) *Ante* p. 457.

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under execution in the Court of the Munsiff to that for the Subordinate Judge, so that the Subordinate Judge may deal with both decrees together. The order of the lower Appellate Court is accordingly set aside, and the order of the Munsiff disallowing execution of this decree restored, but not on the grounds stated by the Munsiff, which are still open for consideration before a properly constituted Court.

J. V. W. *Appeal allowed.*

PRIVY COUNCIL.

P. C.* 1888 *November 16th.*

MAJID HOSSAIN AND OTHERS (PLAINTIFFS) *v.* FAZL-UN-NISSA (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Registration—Registration in accordance with the rules of 1862, *regulating the place and mode of it, in Oudh—Oudh Estates Act I of* 1869, *s.* 13.

An Oudh talukdarni made a grant of a village, part of her talukdari, to her adopted daughter; the instrument requiring, in order to be valid under Act I of 1869, s. 13, to be registered within one month after execution. With a view to its registration, she, being a purdanashin, sent for the neighbouring Pargana Registrar, who attended at her house for her convenience, took her acknowledgment of the document, recorded the registration, and filed a copy of the document in his office.

Held, that this proceeding was a registration of the document, complete and effective; having been, substantially, a registration at the Pargana office.

APPEAL from a decree (26th August 1885) affirming a decree (1st June 1885) of the District Judge of Lucknow.

The question was, whether a deed of gift required to be registered under Act I of 1869, s. 13, had been effectively registered.

The suit in which this question was raised was brought by Amir Haidar, talukdar of Gauria in the Lucknow District, to have set aside a deed of gift, of village Nizampur, executed, on 21st March 1871, by the late Mussammut Kutb-un-Nissa, his

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, and MR. STEPHEN WOULFE FLANAGAN.

predecessor in estate, in favour of her sister Mussammut Fazl-un-Nissa, the defendant. Amir Haidar was brother and heir of the last male talukdar; and he had, in March 1884, obtained the order of Her Majesty in Council, affirming a decree for the taluk against his nephew, Abdool Razzak, to whom Kutb-un-Nissa had bequeathed it by a will, which, not having been duly registered in accordance with Act I of 1869, s. 13, was held invalid (1).

The village in suit being a portion of the talukdari estate of Gauria, could not to be given to Fazl-un-Nissa, except by an instrument of gift, executed and attested, not less than three months before the death of the donor, and registered within one month from the date of its execution—(Section 13, Act I of 1869). By the term "registered," according to the interpretation clause of the same Act, is to be understood registered according to the provisions of the Rules relating to the Registration of Assurances for the time being in force in Oudh.

The Judicial Commissioner's Circular, 41 of 1862, dated 25th February 1862, gave the rules for registration in force in Oudh in 1871. The first provided that there should be one Registrar in each pargana, who should register contracts regarding immoveable property. The second rule, after providing that all deeds, relating to "real property," must be registered at the office of the Registrar of the Pargana in which the property was situate, contained the following: "All deeds of a value exceeding Rs. 500 will be registered by tehsildars in outlying tehsils, or by the Sadr Registrar, if the property is within the jurisdiction of the Sadr Tehsil, but they are invariably to send a copy for record in the Pargana office."

In the present case the donor, an aged purdanashin, sent for the Pargana Registrar to her own house. What followed is set forth in their Lordships' judgment.

The Courts in Oudh concurred in the opinion that there had been substantial compliance with the rules in force; the Judicial Commissioner, Mr. T. B. Tracy, affirming the decree of the District Judge dismissing the suit. Pending an appeal to Her

(1) *Haji Abdool Razzak* v. *Munshi Amir Haidar*, L. R., 11 I.A., 121; I. L. R., 10 Calc., 976.

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Majesty in Council, Amir Haidar died, and was succeeded by the present appellants, by order of revivor, dated August 1888.

Mr. *R. V. Doyne*, for the appellants, argued that the attempted registration was ineffectual. It occurred in the outlying tehsil of Mohanlalgauj, and the proper registering officer was the tehsildar. And even if the Pargana Registrar had authority, he was authorized to effect registration only in his own registry office, in the absence of special cause assigned by him for registering at the house of the party executing.

Mr. *C. W. Arathoon*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

LORD FITZGERALD.—Their Lordships are of opinion that this objection ought not to prevail.

Kutb-un-Nissa made a grant to her adopted daughter of the village of Nizampur, which required to be executed three months before her death, and to be registered within a month after the date of its execution. The objection taken to the instrument was that it was not presented at the office of the Registrar, but that the Registrar was sent for to Kutb-un-Nissa's residence where the deed was executed and registered. She appears to have been a purdanashin; and the mode in which registration was effected was in this manner: She sent for the Pargana Registrar, whose name is given as Kali Churn, and he attended at her house. Her house appears to be near the office of the Pargana Registrar, and actually within the very village which was the subject of the grant. Kali Churn having attended her, and having the deed acknowledged in his presence, word for word, by the granting party, and having examined it, it was handed to him for registration.

The record of registration by the Registrar is as follows:—

"*No. 131, Volume* 2.—On Tuesday, the 21st March 1871, at 10 A.M., Mussammat Kutb-un-Nissa, aged about 65 years, wife of Jahangir Bakhsh, talukdar of Gauria, sent for me at her house in the village Gauria. She got this document executed in the presence of Ganesh Bakhsh and of Beni Parshad, the witnesses named on the margin, and having presented it for

registration, admitted its execution on her part and attested the contents word for word, and, having seated herself on the threshold of her doorway, marked the document with her own hand in my presence. Mussammat Amiran, wife of Mahbub Ali, resident of Amethi, identified the obligor: therefore having registered this deed, drawn up on a blue impressed stamp of the value of Rs. 16, it is returned in original through Ganesh Bakhsh, a copy thereof having been kept, and Rs. 5, on account of fees, having been received.

(Sd.) KALI CHARAN,

Pargana Registrar of Mohanlalganj.

No. 26."

Their Lordships presume part of his duty was either to make a copy himself or to examine the copy made. Having thus got the original deed into his hands, and marked it, and having had that deed duly acknowledged so as to give the best testimony of its execution by the grantor, and having examined the copy which was either prepared by himself or prepared for him, and examined it word for word with the deed, his next step is to take those instruments to his office; to enter the registration in the book; and to file the copy in the proper Pargana office of the District.

The sole objection to that registration upon which their Lordships are asked to invalidate that deed is that the grantor did not go to the office of the Pargana Registrar. He came to her as a matter of convenience and received the deed and copy at her house. That is the sole objection. And upon that their Lordships are asked to declare this registration to be null and void, and consequently that the deed is worthless.

The registration is to be in accordance with the rules for the time being in force, and the registration is to be judged by those rules, and those alone. The first rule is this: "There must in future be only one registrar in each pargana for the registration of deeds relating to real property, who shall be especially appointed for that purpose, and styled the Pargana Registrar. He may, of course, register any other contracts that can be registered by ordinary registrars, but no other registrar

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may register any contract regarding immoveable property." He certainly could not be more clearly ear-marked as the proper and only registrar to register this deed under the circumstances. But there was something more to be provided for; and accordingly their Lordships find this in rule 2: "All deeds regarding real property, or in any way creating liens and encumbrances upon it, must be registered at the office of the registrar"—that is to say, the Registrar previously named, namely the Pargana Registrar—"of the pargana in which the property is situated, and must be copied in full. If for any special reason, parties at a place distant from the property wish to register a deed affecting it, they must go to the Tehsildar or Sadr Registrar, who will register it, and will immediately transmit a copy to be registered at the office of the pargana in which the property is situated, charging and transmitting an extra fee for the same." That addition to or alteration of the second rule provides for a case of public convenience. These districts are no doubt very large in India, and it may be a very great inconvenience and expense for parties by reason of distance to attend at the Pargana office, and then by this rule they get the facility in place of attending at the Pargana office of going before the Tehsildar, or the Sadr Officer, who receives the deed, and makes the copy, and transmits it to the Pargana Registrar. It is obvious that this is not one of those exceptional cases, for the lady did not live at a distance from the Pargana District. She was within it, and a very short distance from the office of the registrar. The registration in fact took place at the office of the Pargana Registrar, though the officer attended to receive the deed, to receive its acknowledgment, and to compare the deed with the copy. He brought it all to his own office, and the registration is in fact the recording of that copy in the office of the Pargana Registrar, all the other requisites provided by the rule having been otherwise complied with.

Their Lordships are of opinion, without going further, that the registration was effective, complete, and full; and that the Deed ought not to be disturbed on that account.

There is said to be a contradictory provision at the conclusion of clause 2. Their Lordships do not find it necessary to express any

opinion upon that. Their Lordships understand that rule has been superseded; but at any rate, they do not find it necessary to express any opinion on the question whether there is any contradiction between the two clauses. They are of opinion here that the registration was before the proper officer, and substantially a registration at the office of the Pargana District.

Their Lordships will, therefore, humbly recommend Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

MOHIMA CHUNDER MOZOOMDAR AND OTHERS (PLAINTIFFS) v. MOHESH CHUNDER NEOGHI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

P. C.* 1888. *Nov.* 19 *and* 20

Limitation Act (XV of 1877), sched. ii, Art. 142—Burden of proof—Date of dispossession or discontinuance of possession.

The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 142 of sched. ii of Act XV of 1877) next preceding the suit.

That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession.

APPEAL from a decree (15th March 1886) of the High Court reversing a decree (10th June 1884) of the Subordinate Judge of Pubna.

On July 30th, 1883, the plaintiffs, now appellants, filed their plaint in the Court of the Subordinate Judge of Pubna, against 81 defendants, for the possession of land, of which the plaintiffs

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alleged that they were wrongly dispossessed in Assin 1282, corresponding to September 1874. Of the defendants, numbers 1 to 27 were sued as claiming to be proprietors of the land as part of their own village of Machuakandi. Numbers 78 to 81 were *pro formâ* defendants, having an interest in the land if belonging to Rajapur. The remaining defendants were tenants under the first 27.

The question, which was practically decisive, on this appeal was whether the admitted dispossession of the plaintiffs took place at a period within, or beyond, twelve years before the 30th July 1883.

From the revenue records of 1822 it appeared that of the contiguous mauzahs Rajapur and Machuakandi, the latter was in 1844 diluviated by the river Ichamatti, which had till then been the boundary between it and Rajapur. The river then went further in the same direction, eastward from its former channel, leaving land re-formed on the old site.

This was resumed by the Government, and was afterwards measured and assessed as part of Machuakandi. The proprietors of Rajapur, however, claimed the re-formation as part of their mauzah, and, on the 3rd August 1846, the whole of the lands, measured and assessed as appertaining to chur Machuakandi, were re-leased to the proprietors of Rajapur as accretions to it. Some time before 1861, ryots were settled on this disputed land. According to the defendants' evidence, the cultivators and tenants all came from Machuakandi.

It was admitted by the plaintiffs that from the month of Assin 1282 (September 1874), the defendants had refused to acknowledge their rights as proprietors. No attempt was made to assert their title until May 1882, when some of the plaintiffs' tenants preferred a complaint to the Magistrate of Serajgunge, against some of the present defendants, alleging acts of violence to prevent their paying rent to the plaintiff proprietors. On the 12th July 1882 the Magistrate, proceeding under s. 530 of the Code of Criminal Procedure, found that the land in dispute was, and had been, in the possession of the Machuakandi ryots, and not of the ryots from the

original Rajapur. This led to the present suit, in which the plaint was founded upon an alleged continuous title to the land in dispute as part of the mauzah Rajapur. It alleged dispossession in Assin 1282 (September 1874), complained of the Magistrate's order of 12th July 1882, claiming that the plaintiffs' title should be established, they be put into possession, and receive mesne profits.

The answer of the defendant proprietors asserted that the land belonged to Machuakandi and not to Rajapur, and set up limitation under Art. 142 of sched. ii, Act XV of 1877. The issues raised the question of the plaintiffs' possession within the period of twelve years. The Subordinate Judge, upon the evidence, came to the conclusion that the plaintiffs had acquired title to the land in dispute, as accertions to their ancestral mauzah Rajapur, and were in possession of it from 1848; and their possession was upheld at the time of the survey measurement of the mehal Rajapur in 1852 and 1853. Then, it was to be seen whether the plaintiffs' claim was barred by limitation in consequence of their having been out of possession between the years 1870 and 1882. As to this, the Subordinate Judge found that it had been proved that although the plaintiffs and their old tenants were dispossessed from the greater part of the lands in dispute in 1875, yet they retained part of them, till ousted under the proceedings in 1882; and that, therefore, the plaintiffs' claim was not barred by limitation as to the whole of it. He accordingly decreed the claim in part.

Against this decree defendants 1 to 18 appealed to the High Court; the plaintiffs cross-appealing for what had not been decreed.

The judgment of a Division Bench, (McDonell and Beverley, JJ.,) was that the decree of the lower Court was wrong, and that the suit should have been dismissed. The evidence, in the opinion of the Court, was unsatisfactory, the witnesses were tenants and interested, the absence of zemindary papers unexplained; and the judgment concluded as follows:—

"Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject

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of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred."

Mr. *C. W. Arathoon*, for the appellants, contended that, on the evidence, the Subordinate Judge's finding that these appellants had possession of part of the property in suit, within twelve years before the institution of the suit, was clearly right. The presumption then was that what had been shown to be the antecedent state of things continued; and this if not establishing the plaintiffs' possession within twelve years of the suit being brought, was sufficient, at all events, to throw the burden of proving when they were dispossessed on to the defence.

He referred to *Rao Karan Singh* v. *Bakar Ali Khan* (1) and the Bengal Administration Report for 1872-1873.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the respondents, argued that the decision of the High Court was right, the suit, having been barred by the law of limitation of Art. 142 of sched. ii of Act XV of 1877.

Mr. *C. W. Arathoon* replied.

Their Lordships' judgment was delivered by

MR. STEPHEN WOULFE FLANAGAN.—This is an appeal from a decree of the High Court of Bengal dated the 6th March 1886, reversing a decree of the lower Court of the 10th June 1884. The action in this case was brought to recover possession of certain lands which need not be particularly described. It is sufficient to say that they are lands in the possession of the respondents. A great deal of evidence has been given on the one side and the other as to the original title to these lands which were claimed by the plaintiffs as part of "Rajapur," and by the defendants as part of "Machuakandi." It appears to be unneces-

(1) L. R., 9. I A, 99; I. L. R., 5 All., 1.

sary to go into that title. The question is whether, assuming the plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th July 1883, was filed within 12 years, as required by the 142nd article of the Limitation Act of 1877, from the date of their dispossession or discontinuance of possession.

It is conceded by the plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of eight or nine years prior to the bringing of this suit, and that the defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date

Now the only question in this case being one of fact with reference to the Limitation Act, it will be well to turn to the judgment of the Judge of the lower Court and see upon what grounds he based his decision in favour of the plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas, (which, in their Lordships' opinion are not evidence of possession within the time in question) he goes to the substantial question upon which his decision is based. He says: "It is also to be observed that the title of the defendants Nos. 1, 3, 4, and 5, to the mauzah Machuakandi was created just after the agrarian disturbance in this district. This circumstance alone is sufficient to lead me to believe that the defendants took advantage of the opportunity to revive their lost right to the mauzah Machuakandi by inducing the ryots of the chur Rajapur to admit them as their landlords." Then he says: "It was argued by the defendants' pleader, that the plaintiffs failed to prove collection of rent from their alleged tenants, as they did not file any collection papers, and their loss is not properly accounted for. It is proved by the plaintiff No. 1, and the plaintiffs' witnesses that in 1279 the plaintiffs' cutchery house was blown down by rain and storm, and greater part of the papers were lost, and the defendants' witness No. 1 deposed that occasionally he and his brother Kali Komul used to take papers from their ijmali serishta, and he made over certain papers to his co-sharers at the time of instituting this suit."

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Now, merely making a short comment on the first passage which has been just read, it appears to their Lordships that the question for decision is not whether or not the title of the defendants was created just after the disturbance or otherwise, but when were the plaintiffs dispossessed or when did they discontinue possession? The plaintiffs by their own witnesses have admitted in fact that their possession was discontinued, at all events, in July 1875. By one of their witnesses,—their principal witness,—Gomashta Panaulla, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes: witnesses who either are or have been in the employment of the plaintiffs, or witnesses who have been tenants upon the lands—witnesses who in fact had been dispossessed by the respondents, whose evidence, therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the plaintiffs here, to show their possession or their receipt of rent for a period within 12 years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. The statement by the witnesses in reference to the cyclone in the year 1872 and the destruction of their house and the place where they alleged all the papers were kept, and the scattering of those papers, is certainly one which cannot be relied on in a case of this kind as proving that documentary evidence of value in support of their possession had ever existed, nor as affording a sufficient reason for its non-production. It is also a singular circumstance in reference to the destruction of their cutcherry house by the cyclone in the year 1872, that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the plaintiffs as distinguished from their possession are all forthcoming. How

it is that they were not destroyed with all the other papers in that cyclone is not explained, but it is a remarkable thing and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming, and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced and have been either in the possession of the plaintiffs, if they really existed, or in the possession of their tenants, but which have not been produced. These papers are, amongst others, the receipts for the rents alleged by the plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they allege their possession was first determined; these, although alleged to exist, were not produced. The learned Judge then says: "When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain possession of these lands." That, as a proposition of law, is one which hardly meets with the approval of their Lordships.

This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *á fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed.

Now, turning from the judgment of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made reversing the decision

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of the Court below and dismissing the plaintiffs' suit with costs, the Court says in reference to the Law of Limitation: "This suit was instituted in the month of Srabun 1290, and it was, therefore, for the plaintiffs to show that they had been in possession of the land in suit since Srabun 1278. Now, admittedly, according to the plaintiffs, they were ousted in the year 1282, that is, eight years before the institution of the suit. And we find from the evidence, and particularly from the evidence of their gomashta Panaulla, that virtually they admit having been dispossessed so far back as 1280." That would be the year 1873. "In that year, according to the evidence for the plaintiffs, their tenants first grew refractory; and it does not appear that the plaintiffs ever collected rent, or were in possession after that year. That being so, it appears to us that a very heavy onus lay upon them to prove that they were in possession during the two years previous, that is, from 1278." With that observation their Lordships entirely concur: "and we are further of opinion that they have not succeeded in proving this." In that observation their Lordships also concur. "The only documentary evidence adduced on this point is a chitta of the year 1280. This chitta purports to have been prepared by one Tamiz Sircar, who, though alive, has not been called." What its contents may have been it is impossible from the record here to collect, but, at all events, this chitta having been prepared by Tamiz Sircar, who appears to be alive, Tamiz Sircar was not produced. "His signature on the paper has been proved by the gomashta Panaulla. But whether the chitta was really prepared by Tamiz Sircar and under what circumstances and how far it would be evidence of possession, are matters upon which there is really no evidence. This being so, it may be said that, practically, there is no documentary evidence whatever of the plaintiff's possession." Then the Court goes on to say: "No dakhilas, kabuliyats, or pottahs have been put in." Their Lordships have already made a comment as to the non-production of some of these documents. "The only evidence on the question of possession consists of certain oral statements made by the servants and tenants of the plaintiffs. These tenants admit that they are now holding the lands of

usli Rajapur and that they would benefit if the plaintiffs succeed in this suit. We think that very little reliance can be placed upon the evidence of such witnesses, unsupported, as they are, by a single scrap of documentary evidence." Then the learned Judges commenting on the manner in which the absence of documentary evidence is attempted to be accounted for, namely, by a reference to the cyclone and the suggestion that one of the defendants having become a lunatic, he had got possession of some material papers; but why the papers, whether in his possession or that of his family, if the papers ever got in his possession, should not have been produced and proved has not been accounted for or explained in any way, say: "We think that neither of these reasons is satisfactory; and, in the absence of better evidence, we think the plaintiffs have not discharged the onus that lay upon them." Then the Judges of the High Court go on to say: "Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred." It appears to their Lordships that the High Court, in making that observation in reference to the criminal proceedings, must have mistaken the decision of the Magistrate, because so far as appears from the judgment in that case, it would seem that in point of fact the Magistrate finds that for a period of at least four years prior to the institution of those proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of mauzah Machuakandi, and this finding, so far from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of Rajapur, is distinctly to the contrary. Upon the whole, in this case, their Lordships, without going further into the matter, or considering the

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defendants' evidence, which is, however, cogent to show that they have in fact been in possession for more than 12 years prior to the filing of the plaint, are of opinion that the appeal from the decision of the High Court of Bengal should be dismissed, and the decree appealed from affirmed, and they will humbly advise Her Majesty accordingly.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*,

Solicitors for the respondents : Messrs. *Oehme, Summerhays & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Beverley.

BINDESSURI PERSHAD SINGH AND OTHERS (DEFENDANTS) *v.* JANKEE PERSHAD SINGH (PLAINTIFF).*

1889 *February* 14.

Superintendence of High Court—Arbitration—Award—Application to file award, objection to—Decree on award, finality of—Private Arbitration—Revisional powers of High Court—Jurisdiction—Civil Procedure Code (Act XIV of 1882). *s.* 520, 521, 525, 526 *and* 622.

Certain disputes between parties were referred under a written agreement to an arbitrator, who, in due course, made his award. The plaintiff then applied to the Subordinate Judge to have the award filed in Court under the provisions of s. 525 of the Code of Civil Procedure. The defendants came in and objected to the award on the following amongst other grounds :—

(1) That the value of the property in suit was Rs. 500 only, and therefore that the application should have been made in the Munsiff's Court and not in that of the Subordinate Judge.

(2) That the agreement of submission was vague and indefinite and did not clearly set out the matters in dispute.

The Subordinate Judge overruled the objection without taking any evidence, and directed the award to be filed and a decree to be passed

* Appeal from Order, No. 362 of 1888, against the order of Baboo Upendra Chunder Mullick, Subordinate Judge of Bhaugulpore, dated the 18th of May 1888.

thereon. The plaintiff appealed. The defendants contended that no appeal lay, and that if it did, it lay to the District Judge and not to the High Court.

Held, that, assuming that on a proceeding under ss. 525 and 526, the Court has power to consider such objections as are mentioned in ss. 520 and 521, the above objections did not fall under either section, but that the Subordinate Judge, before entertaining the application, was bound to satisfy himself that he had jurisdiction to entertain it, and for that purpose to take evidence regarding the value of the property; and that even if no appeal lay, the High Court could interfere under its revisional powers, because the Subordinate Judge had acted in the exercise of his jurisdiction illegally in assuming jurisdiction without taking such evidence.

Held, further, that as the second objection was well founded inasmuch as the agreement to refer was vague and indefinite, and did not clearly lay down the power of the arbitrator in dealing with the subject-matter in dispute, and as it was not possible to make out what powers were intended to be conferred upon the arbitrator, the award should not be allowed to be enforced under the provisions of ss. 525 and 526.

THIS was an appeal from an order passed by the Subordinate Judge of Monghyr, upon an application to file an award, under the provisions of s. 526 of the Code of Civil Procedure.

Upon the application being made, the defendants (appellants) objected, and showed cause why the application should not be granted. Amongst other objections the defendants contended that the property was under Rs. 1,000 in value, and that the Subordinate Judge had no jurisdiction to entertain the application. The Subordinate Judge, however, held that the award should be filed and enforced as a decree.

The material portion of the judgment of the Subordinate Judge was as follows:—

"There is nothing to show that the claim has been undervalued, but there are reasons to believe that it has been properly valued, the land and buildings being the subject-matter of the award."

"The award has been read over, and I think that, considering the ability of Pandit Teknarain Das, it is sufficiently clear to decide the points in dispute. The arbitrator measured the lands and prepared plans and khusra by consent of parties. The petition of reference is, no doubt, not very happy and clear; but since the parties chose to leave the matter in general terms in

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the hands and discretion of the arbitrator selected by them, it cannot now be said that the arbitrator has exceeded the bounds of his authority. I hold that the award, as it is, is valid. No other valid grounds have been made out against the filing of the award. I accordingly allow it to be filed, and under the peculiar circumstances of the case each party shall bear its own costs."

Against that order the defendants preferred this appeal to the High Court.

Mr. *C. Gregory* and Baboo *Rajendronath Bose* for the appellants.

Mr. *Rash Behary Ghose* and *Baboo Nilkant Sahai* for the respondent.

The nature of the grounds upon which it was contended that the order and decree of the lower Court should be set aside appear sufficiently for the purpose of this report in the judgment of the High Court (MITTER and BEVERLEY, JJ.) which was as follows:—

This is an appeal from an order of the Subordinate Judge of Monghyr, directing an award to be filed under the provisions of s. 526 of the Code of Civil Procedure.

A preliminary objection has been raised on behalf of the respondent that no appeal against such an order will lie, and that, if an appeal be allowed, it will lie to the District Judge and not to this Court.

We are clearly of opinion that, under the provisions of the Code, no appeal will lie against the order directing the award to be filed.

But in the present case the award has been followed by a decree, and the question is whether, regarding this as an appeal against that decree, the appeal will lie.

There has been some conflict of authority in this Court as to the proper construction of ss. 525 and 526 of the Code, and the procedure which they are intended to lay down. On the one hand it has been held in the cases cited in the margin that, if upon an application to file an award under

(1) *Sree Ram Chowdhry* v. *Denobundhoo Chowdhry* (I.L. R., 7 Calc., 490) decided by Pontifex and Field, JJ.

(2) *Hurronath Chowdhry* v. *Nistarini Chowdrani* (I. L. R., 10 Calc., 74,) decided by Garth, C.J., and Macpherson, J.

(3) *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhry*, (I. L. R., 9 Calc., 557) decided by Wilson and Macpherson JJ. This view seems also to have found favor in a decision of a Full Bench of the Allahabad Court in *Bhola* v. *Gobind Dayal* (I. L. R., 6 All., 186.)

s. 525, any objection, such as is mentioned or referred to in ss. 520 and 521, is taken to the award, the Court is not at liberty to inquire into the validity of such objection, but should stay its hand, refuse to file the award, and leave the party aggrieved to enforce by it regular suit.

On the other hand, the cases cited in the margin have ruled that when objections are preferred to the filing of an award under ss. 525 and 526, the Court is bound to inquire into those objections, and to decide whether or not the award should be enforced.

By s 526 an award when filed, "takes effect as an award made under Chapter XXXVII," and s. 522 prescribes the mode in which effect is to be given to an award. "The Court shall proceed to give judgment according to the award," and "upon the judgment so given a decree shall follow." Then come the words: "No appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award."

In *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1), a Full Bench of this Court held, upon s. 327 of the old Code of 1859, that where there was no valid award, an appeal would lie against the decree made upon it; and a similar opinion was expressed in *Joy Prokash Lall* v. *Sheo Golam Singh* (2).

It would seem to follow, therefore, that there is an appeal against a decree made upon an award—

(1) when the decree is in excess of the award;

(2) when it is not in accordance with the award; or

(3) when there is no valid award.

Now the objections made to the award in the present case may be summarized as follows:—

(1) That the value of the property in suit was Rs. 500 only, and, therefore, that the application should have been made in the Munsiff's Court, and not in that of the Subordinate Judge.

(1) *Dutto Singh* v. *Dosad Bahadur Singh* (I. L. R., 9 Calc., 575) decided by Mitter and O'Kinealy, JJ., following *Dandekar* v. *Dandekars*, (I. L. R., 6 Bom., 663) decided by Melvill and Pinhey, JJ. The same view was taken in *Jones* v. *Ledgard* (I. L. R., 8 All., 340) by Straight, J. and apparently also by the Madras Court in *Micharaya Gurucu* v. *Sadasiva Parama Gurucu* (I. L. R., 4 Mad., 319) decided by Turner, C.J., and Muttusami Aiyar, J.

(1) 8 B. L. R., 315.

(2) I. L. R., 11 Calc., 37.

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(2.) That the agreement of submission is vague and indefinite and does not clearly set out the matters in dispute.

(3.) That the award is indefinite and merely an expression of the arbitrator's opinion; that there was in fact no decision.

(4.) That the arbitrator took no evidence and proceeded in the absence of the objectors.

The Subordinate Judge found that the arbitrator had proceeded in accordance with the ikrarnamah submitting the case to him for arbitration; that he had not exceeded his authority; and that his award was sufficiently clear to decide the points in issue. No ground, therefore, such as is mentioned or referred to in s. 520 or s. 521, having been shown against the award, he ordered it to be filed, and made a decree in accordance with it.

Assuming that in a proceeding under ss. 525 and 526, the Court has power to consider such objections as are mentioned in s. 520 or s. 521, of the objections summarized above the first and second do not fall under either section. The Subordinate Judge, before entertaining the application of the respondent, was bound to satisfy himself that he had jurisdiction to entertain it. If the value of the property be below 1,000 rupees, he would have no jurisdiction to entertain the application. With reference to this objection he was bound to take evidence before assuming jurisdiction. This he has not done. Therefore, even if no appeal lies, we can interfere with the decision of the lower Court upon this point, because it has acted in the exercise of its jurisdiction illegally in assuming jurisdiction without taking evidence. Having regard to the second objection, which seems to us to be well founded, we are of opinion that we ought to interfere under s. 622. We have referred to the terms of the ikrarnamah, and it appears to us to be vague and indefinite in not clearly laying down the powers of the arbitrator in dealing with the subject-matter in dispute. The passage which was intended to define his powers is as follows:—

"We, the declarants (all three parties), in order to set the aforesaid disputes and quarrels at rest, do appoint Sri Pandit Teknarayan Dasji, disciple of Sri Motiram Dasji, inhabitant of mohullah Kamchha, city Kashiji, district Benares, as a panch

or arbitrator, and declare and give in writing that the said arbitrator would come to a decision in accordance with *kurrah* and with reference to possession; in respect of such Dih lands as are occupied by dwelling-houses according to *kurrah* and such as are held possession of without reference to *kurrah*; as also in respect of the property claimed in the suit brought in the Court of the Munsiff of Begu Serai."

We have not been able to make out what powers were intended to be conferred upon the arbitrator by this passage.

The agreement, therefore, not clearly defining the powers of the arbitrator, we are of opinion that the award should not be allowed to be enforced under the provisions of ss. 525 and 526 of the Civil Procedure Code. We, therefore, set aside the decree of the lower Court, and direct the application of the respondent to be dismissed. The agreement executed by both parties being vague and indefinite, the appellants are, in our opinion, not entitled to costs in either Court.

H. T. H. *Appeal allowed.*

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABRAHAM (PETITIONER) *v.* MAHTABO AND ANOTHER (OPPOSITE-PARTIES).*

1889 *March* 28.

Criminal Procedure Code (Act X of 1882), s. 551—"Unlawful detention for an unlawful purpose—Infant, Custody of.

A Hindu girl, under the age of 14 years, went of her own accord to a Mission House where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551 of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the

* Criminal Motion No. 25 of 1889, against the order passed by C. C. Quinn, Esq., Magistrate of Patna, dated the 6th of December 1889.

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circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother.

Held, upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her.

Held, also, that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian, but that the purpose whether entertained towards a woman or a female child must be in itself unlawful.

Held, consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order.

Held, further, that, although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that, having regard to the circumstances of the case, there was nothing to justify such an order being passed.

THIS case arose out of an application made by Mahtabo and Radhakissen to the Magistrate of Patna, under s. 551 of the Criminal Procedure Code, for an order that Ellen Abraham, who was the Lady Superintendent of the Patna Zenana Mission, should restore to their charge a girl Luchminia.

Radhakissen claimed to be entitled to the custody of the girl as her husband, and Mahtabo, who was her mother, was quite willing that her daughter should be made over to him; throughout the proceedings the two petitioners were regarded as forming one party. On the application being made to the Magistrate, an order was passed on the 30th October, directing Miss Abraham to produce the girl in Court, and show cause why she should not be made over to her husband or mother, and thereafter cause was shown, both parties heard by the Magistrate, and several witnesses examined before him. On the 6th December, the Magistrate passed an order to the effect that the petitioners were entitled to the charge of the girl, and that, as they were willing that she should be made over to one

or other of them, she should be made over to the charge of the mother Mahtabo, which was accordingly done.

The facts of the case are fully stated in the judgment of the Magistrate, the material portion of which was as follows :—

"The admitted facts of the case are that the girl Luchminia had been living with Radhakissen, either as his wife or his mistress, for several months, and that on the night of the 16th October she left his house in the company of a woman named Sundari, who was the kept mistress of Radhakissen, and went to the Mission House where she is now living.

"There is, in my opinion, nothing to show that the girl was abducted in the sense in which 'abduction' is used in the Penal Code. To constitute such abduction the use of force or deceit is essential, and there is no reason to believe that either force or deceit was used in this instance. I am also of opinion that if the word 'abduction' include 'kidnapping,' there is nothing in this case to justify the inference that the girl was kidnapped. I am satisfied that the girl went to the Mission House of her own free will, and that she remains there of her own free will.

"The only ground on which the provisions of s. 551 can be applied is that the girl is unlawfully detained. If, as is contended by the respondent, the girl has completed the age of 14 years, it is clear that under this section she must be regarded as a 'woman' and not as a 'child,' and the only order that I could pass would be an order to set her at liberty, and at the same time, it is evident from the girl's own statement, that she is already at liberty. If then the girl has completed the age of 14 years, the order cannot take effect and must be discharged, and it is, therefore, necessary to determine whether the girl has reached this age or not. I do not intend to discuss this question at length; I will only state that the mother and uncle of the girl who are good witnesses, if trustworthy, depose that she is between the age of eleven and twelve years; and that the pundit who prepared her horoscope deposes to the same effect, and has produced the horoscope itself, which bears out this statement as regards her age. I should add, however, that there is no independent evidence that the horoscope was prepared

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at the time alleged, and it is possible that it may have been fabricated for the purpose of this case. On the other hand there is the deposition of the girl herself, which, however, I do not consider to be very good evidence in a case of this kind, and I may add that though her statement, if relied on, shows that she must he more than 12 years of age, it does not clearly establish the fact that she has completed her fourteenth year. The only other evidence, if it can be considered evidence at all, is the testimony of Matangini Bose, that the girl's mother stated her age to be fourteen years. Assuming the evidence to be true, it is clear that, under the circumstances described, the mother had an object in exaggerating the girl's age and it might also be fairly inferred that the girl's appearance and demeanour were such as to suggest that she was younger than her mother represented her to be. Considering the whole evidence on this point, I have come to the decision that the girl is a female child under the age of 14 years. The next point is whether she is unlawfully detained for an unlawful purpose. It is argued that there is no detention whatever, because the girl is free to go or stay; but, in my opinion, a child who is kept or allowed to rem ain in any place, against the wish of his or her lawful guardian, is detained, the child having no voice in the matter as regards assent or dissent. The detention, however, must be unlawful and for an unlawful purpose. The term unlawful is not defined, but a similar word '*illegal*' is defined in the Penal Code and includes everything which furnishes ground for a civil action. I have no doubt that the detention of a child, by a person having no legal claim to the charge of such child, if maintained against the wish of the lawful guardian, would furnish ground for a civil action and I am also of opinion that the detention of a female child, under circumstances calculated to induce her to abandon the religion of her parents and family and to enter another community, which would involve her being outcasted, would be detention for an unlawful purpose. The truth or falsehood of the religion is a matter of which the law takes no cognizance and cannot affect the question. There is no doubt that if the girl remain in the respondent's charge, she will be instructed in the Christian religion and will be

encouraged to become a Christian, and I hold that the respondent cannot lawfully detain the girl against the will of her lawful guardian for such a purpose. The next point that has been raised is that Radhakissen is not entitled to the charge of the girl as he is not her lawful husband. It is, I think, fully proved that Radhakissen went through a form of marriage with the girl, which is recognised as a legal form of marriage by members of his caste, and that he subsequently lived with her and treated her as his wife, and it is not proved that the marriage was invalid by reason of the fact that the girl is of a superior caste and was a widow at the time of the marriage. I think that a good deal of time has been unnecessarily taken up in examining so called experts on this point and I have declined to postpone the case in order to have further evidence of this kind produced; as regards the mother, the only ground on which any serious attempt has been made to dispute her right to the charge of her daughter is that she made over the girl to Radhakissen knowing that no lawful marriage had taken place, and that virtually the girl was made over to Radhakissen to live with him as his mistress, and that having acted in this immoral manner she has forfeited the right to have charge of her daugter. Even assuming, for argument's sake, that the marriage was invalid, there are in my opinion no grounds for inferring that the mother knowingly abetted in the celebration of a mock marriage and intentionally surrendered her daughter to a life of immorality.

"I cannot, therefore, hold that Mussammat Mahtabo has forfeited her natural rights.

"I am of opinion that both Radhakissen and Mussammat Mahtabo are entitled to the charge of Mussammat Luchminia, and as their pleader states that they are willing that the girl should be made over to one or other, I direct that she be made over to the charge of Mussammat Mahtabo."

On January 17th, Mr. *M. P. Gasper*, on behalf of Miss Abraham, applied to the High Court (Mitter and Macpherson, JJ.) for a rule calling on the Magistrate to produce the records in the case and to show cause why his proceedings and order should not be set aside and the girl Luchminia be allowed to return to the custody of Miss Abraham, if she were desirous of doing so.

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The application was made on a petition by Miss Abraham, the material portion of which was as follows :—

1st.—That your petitioner is the Superintendent of the Zenana Mission established at Patna and residing at Goolzarbah in that city.

2nd.—On the 16th day of October 1888, a woman named Luchminia, accompained by another woman, Sundari by name, came to the Mission House. Both women had an interview with your petitioner, and having expressed a desire to reside in such Mission House were permitted to take up their residence there.

3rd.—On the 30th day of October 1888, one Mussammat Mahtabo, the mother of the said Luchminia, and one Radhakissen, alleging himself to be the husband of the said Luchminia, put in separate petitions to the District Magistrate of Patna, praying for the restoration of the said Luchminia to them under the provisions of s. 551 of the Code of Criminal Procedure. These petitions, on the face of them, are unverified documents, and, moreover, contain no allegation that the detention complained of was for an unlawful purpose. On the back of the petition, put in by the said Radhakissen, the District Magistrate made an order directing that a summons should issue on your petitioner to produce the said Luchminia before his Court on the 6th day of November 1888.

4th.—On the 6th day of November 1888 your petitioner, in obedience to the order contained in the said summons, appeared in the Court of the District Magistrate, accompanied by the woman Luchminia. On the same day the said Magistrate examined, under solemn affirmation, sundry witnesses, *viz.*, Mussammat Mahtabo, the mother of the said Luchminia, Gurmukh Narain, Radhakissen, the said Luchminia, and the said woman Sundari. After taking the evidence of those witnesses, the Court adjourned the case to the 14th day of November for further evidence.

5th.—On the application made by Mr. Thompson, on behalf of your petitioner, a further adjournment was granted till the 23rd day of November 1888. During the interval which occurred pending this adjournment, and upon the application of the said Gurmukh Narain, the alleged uncle of the said Luchminia, it was arranged that the said Luchminia should, pending final orders to be passed in the case, be made over to the safe custody of Mr.

Sherfuddin, Barrister-at-law, practising in the Patna Courts, and, in accordance with this arrangement, your petitioner, on the 16th day of November 1888, handed over the said Luchminia into the custody of the said Mr. Sherfuddin, and the said Luchminia continued to reside in the house of the said Mr. Sherfuddin for one day. On the 17th day of November 1888, the said Mr. Sherfuddin being unable to continue to take further charge of the girl, the said Luchminia, with the permission of the Magistrate, was handed back to your petitioner, and thenceforward continued under her care till the 6th day of December 1888, when, under the order of the said Magistrate passed on that date, she was forcibly carried off from the precincts of the Court.

6th.—On the 22nd day of November 1888, during the interval between the adjournments of the case at Bankipur, an application was made on behalf of your petitioner to the High Court of Judicature in Calcutta, in its revisional jurisdiction, for a transfer of the case from the file of the said District Magistrate of Patna to the file of the High Court. This application was rejected by this Hon'ble Court on the same date.

7th.—On the 25th day of November 1888, the case coming on for further hearing before the said District Magistrate of Patna, it was ordered, as your petitioner understood, that the same should be adjourned and heard on some day after the 1st day of December 1888.

8th.—On or about the 26th day of November 1888, Mr. Thompson, on behalf of your petitioner, applied for summons for the attendance of three witnesses, Pundit Sukhobasi Tewari, Pundit Behari Singh, and Pundit Protap Narain, to be called for the purpose of supporting the case put forward by your petitioner, and, on the 28th day of November, an order, directing an issue of the said summons, was passed by the Magistrate ordering the attendance of the said witnesses for the 5th day of December.

9th.—On the 28th day of November, your petitioner is informed and believes that the said Magistrate took further evidence on behalf of the complainants, but such evidence was taken in the absence of your petitioner, who was informed by her legal adviser Mr. Thompson, having regard to the order abovementioned, that the case would not be proceeded with on that day.

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10th.—By an order dated the 28th of November 1888, the date of the further hearing of the case was fixed for the 5th day of December 1888.

11th.—On the 5th day of December 1888, a further hearing of the case was held by the same Magistrate, and sundry witnesses on behalf of the complainant in the case were re-called and further examined, as also were Matangini Bose and Pundit Sukhobasi Tewari and Pundit Behari Singh, the two last being two of the three witnesses summoned on behalf of your petitioner.

12th.—On the same day, it appearing that the said Protap Narain, a priest from Benares, already summoned on behalf of your petitioner was not present in Court, a petition was presented to the Court, on your petitioner's behalf, praying that a fresh summons should issue to the said witness, but the Court, by an order made on the back of the said petition, refused to grant a further postponement of the case and rejected the application.

13th.—Your petitioner submits that the said Magistrate in issuing a summons upon your petitioner, under the provisons of s. 551 of the Code of Criminal Procedure, upon the materials as set forth on the 3rd paragraph of this petition, acted illegally and without jurisdiction.

14th.—Your petitioner further submits that the Magistrate was in error in treating the proceeding as contentious, and the procedure adopted by him was not warranted by the words of the section.

15th.—Your petitioner further submits that upon the facts found by the Magistrate, as indicated in his judgment, he was in error in holding that the woman Luchminia was detained by your petitioner, and that such detention, if any, was unlawful or for an unlawful purpose, and that the said Magistrate in so holding acted without jurisdiction and in error of the proceedings contemplated under the provisions of s. 551 of the Code of Criminal Procedure.

16th.—Your petitioner further submits that the said Luchminia was a Hindu woman, a Khetri by caste, and the widow of one Durbari Lall, who died about 14 months before the alleged second marriage with Radhakissen, a man of inferior caste to

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to herself. Upon these facts which appear in the depositions and which have since been accepted by the said Magistrate, your petitioner contended that the so-called second marriage could be no marriage at all, and relied chiefly upon the evidence of her witness the said Pundit Protap Narain, in support of her contention. The Court was in error, and, as your petitioner submits, acted in prejudice of the case she was desirous of setting up, in refusing to adjourn the case for the examination of the said material witness.

17th.—Your petitioner submits that the said Radhakissen had established no right to the custody of the said Luchminia, and that the said Mahtabo had no right, or, if she possessed such right, had forfeited her claims to such custody.

18th.—Your petitioner submits that the said District Magistrate ought to have held that the evidence adduced did not establish the fact that the said Luchminia was under the age of 14 years, or that she had been unlawfully detained by your petitioner, or that she had been so detained for an unlawful purpose.

Mr. *Gasper*, in applying for a rule, pointed out that s. 551 was introduced into the Code for the first time in 1882, though it had previously found a place in the Presidency Magistrate's Act; that it dealt exclusively with women and female children under the age of 14, and that the inference this gave rise to was obvious. It did not deal with general detention, but only with unlawful detention for an unlawful purpose of women and female children; and it was, therefore, obvious that the class of cases to which it was intended to apply was not intended to include a case like the present. He further contended that the first complaint should have been made on oath, which, in the present case, had not been done. And that although the subsequent proceedings might have been on oath, this did not cure the defect. He also contended that the section contemplated a proceeding of a summary character to prevent an impending injury to a woman or female child, and not a long contentious proceeding like the present for the purpose of obtaining the custody of a minor for which other provisions of the law existed.

The Court stopped Mr. Gasper, intimating that the words "unlawful purpose," contained in the section, must probably be

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taken to mean an "immoral purpose," and granted a rule against the Magistrate in the terms asked for.

On the 13th February the rule came on for argument before a Bench of the High Court consisting of Mitter and Trevelyan, JJ.

Mr. *Gasper* and Baboo *Kali Churn Bonnerjee* in support of the rule.

Mr. *Garth*, instructed by the Deputy Legal Remembrancer, for the Magistrate.

Mr. *Gasper*.—Section 551 contemplates that complaint should be made on oath to the District Magistrate, but here there was no such complaint. The Joint Magistrate examined the complainant, but he was not the proper person to do so, and the District Magistrate had no power whatever to delegate his power under the section to a subordinate. The whole proceedings are, therefore, irregular and bad. In the next place, the section contemplates summary action being taken and not the elaborate enquiry, which has been made in this case, when no less than 13 witnesses have been examined. No provision is made in the Code for the examination of any witnesses under this section, and the object of the section is plainly to prevent immediate and irreparable mischief from being done to the persons of females. Then there was no unlawful detention, because the Magistrate has found that the girl was at perfect liberty to rejoin her people if she so desired. Nor was there any "unlawful purpose," for certainly the education of a girl in the principles of Christainty is not unlawful. [Mr. *Gasper* was then stopped by the Court.]

Mr. *Garth*.—The complaint made by the girl's husband and another to the Magistrate was sufficient, and this case comes within the provisions of s. 551. The words of the section are certainly not as clear as they might be, but there can be no doubt that "unlawful detention for an unlawful purpose" must be taken to mean for an illegal purpose.

[MITTER, J.—It seems to me that having regard to the fact that the section only refers to females, "unlawful purpose" must be taken as meaning an "immoral purpose."]

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Mr. *Garth*.—If that was so, the legislature might easily have so enacted; but the word used is unlawful, and that cannot be read as meaning anything else but "illegal." In this case the girl was detained from the lawful guardianship of her husband and mother, in order that her religion might be changed, and that must surely be held to be unlawful detention for an unlawful purpose.

The decision of the Magistrate on this point is correct, and there can be no question as to his *bonâ fides*.

[TREVELYAN, J.—No one has raised any.]

Mr. *Garth*.—If the Court is of opinion that the Magistrate has not taken the right view of the matter, it is not for me to appear to press such view on your Lordships.

[MITTER, J.—The whole question seems to be this: Can the Court say that the detention was an unlawful detention in the first place, and, if it was, was it for an unlawful purpose? The Magistrate appears to think that unlawful detention means detention which furnishes grounds for a civil action, and unlawful purpose as something which would furnish similar grounds; but could a guardian maintain a civil action only upon the ground that his ward was being instructed in the precepts of Christianity without his consent?]

Mr. *Garth*.—A civil action would lie for the custody of a child by its guardian against the person unlawfully detaining it.

During the argument the following cases were cited by Mr. *Garth*: *In the matter of Mahin Bibi* (1) and *Dowlath Bee* v. *Shaik Ali* (2).

[MITTER, J.—The only question we need decide in the case is whether there has been an "unlawful detention for an unlawful purpose" and upon that point we are with you Mr. Gasper.]

It then appeared that the rule had not been issued against or served upon the husband or the mother, but only on the Magistrate, the Court therefore intimated that it could make no order on the former as to the restoration of the girl to Miss Abraham. Mr. *Gasper* accordingly applied for a rule on them, and a rule was issued calling on Radhakissen and Mahtabo to show cause why

(1) 13 B. L. R., 160. (2) 5 Mad. H. C., 473.

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the proceedings should not be set aside, and why an order should not be made to the effect that the circumstances, which existed before the order complained of was made, be restored; or why an order should not be made directing them to produce the girl in the Court of the Magistrate of Patna for the purpose of restoring her to the custody of the petitioner; or why any such other order should not be passed as the facts of the case might warrant or justify. That rule came on to be heard before a Bench consisting of MITTER and MACPHERSON, JJ., on the 20th March.

Mr. *Gasper* and Babu *Kali Churn Bonnerjee* for the petitioner.

Baboo *Umbica Churn Bose* for the opposite party.

Baboo *Umbica Churn Bose* contended that the order of the Magistrate was right, but whether it was so or not, the girl having now gone to her lawful guardians, *viz.*, her husband and mother, the Court could not interfere to deprive them of her custody. There was, moreover, no power given in the Code to compel the production of the girl, and the only course left was for the Court to say that it had no power to remove the girl from her lawful guardians, and that it had no power to grant that portion of the prayer of the petitioner.

Mr. *Gasper*.—There is no order made by a Subordinate Court which this Court, exercising its revisional powers, cannot set aside. The order of the Magistrate under s. 551 being illegal, this Court can set it aside and order the production of the girl. There can be no doubt that when an illegal order has been made this Court has the power, in setting it aside, to restore the *status quo ante* so that the party against whom the order has been made can be in no way injured thereby. *Rodger* v. *The Comptoir D'Escompte de Paris*. (1.)

[MITTER, J.—I have grave doubts whether under the circumstances of this case we can order the mother to produce the girl for the purpose of her being removed from her custody.]

Mr. *Gasper*.—There can be no doubt your Lordships have the power; the only question is, whether you should exercise it. For

(1) L. R., 3 P. C., 465.

that purpose we must look into the circumstances of the case. I am prepared to show from the evidence that the girl was, at the date of the Magistrate's order, in the Patna Zenana Mission House, a house of respectability, where she was cared for, both as far as her comforts and morality were concerned. From there she was taken to Radhakissen with whom her marriage was a sham, and she was being kept for an immoral purpose. The Court having the power, should exercise it and not permit the mere fact of the mother having the custody of the child to prevent that being done.

[MITTER, J.—Under such circumstances proceedings might be taken under s. 100 of the Criminal Procedure Code.]

Mr. *Gasper*.—On the facts it is clear that the mother has taken the child for an immoral purpose, in order to obtain a living by it.

[MITTER, J.—The evidence having been taken by an officer who had no jurisdiction, can we refer to it and take action on it? The matter must first surely be enquired into by a competent Court.]

Mr. *Gasper*.—But the evidence has been recorded, and if the facts are as I represent, this Court, having the power to undo the action of the Magistrate, can also restore the position of affairs to that which existed before the illegal order, and this should be done.

[MITTER, J.—The same object may be attained under s. 100. If the girl was unwilling to remain with her mother, it might be unlawful detention; if she was being detained for an unlawful purpose, and the mother would not be justified in detaining her.]

Mr. *Gasper*.—There might be difficulties in the way of such a course being adopted. All we desire is that, if the girl is being detained for an immoral purpose, the Court should direct that it be open to her to go to a place where she would be protected.

C.A.V.

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The judgment of the High Court (MITTER and MACPHERSON, JJ.) was delivered on the 28th March, and was as follows:—

Section 551 of the Criminal Procedure Code empowers a District Magistrate, upon complaint made on oath of the abduction or unlawful detention of a woman or of a female child under the age of 14 years, for any unlawful purpose, to make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and to compel obedience with such order, using such force as may be necessary.

In pursuance of an order made under that section, the girl Luchminia was taken from the petitioner, who is the Superintendent of the Patna Zenana Mission, and made over to her mother Mahtabo.

The case comes before us in the exercise of our revisional powers on a rule to show cause why that order should not be set aside, and why the girl should not be restored to the charge of the petitioner, or such other order made as the facts of the case may warrant and justify.

The rule was granted mainly on the ground that the order was made without jurisdiction, as the facts found did not disclose "an unlawful detention for an unlawful purpose."

The complainants are Mahtabo, the mother, and Radhakissen, the alleged husband, of the girl. They made separate complaints, but they are really acting together. Their case is that the girl is under 14 years of age; that she was legally married to Radhakissen, with whom she lived; and that she was taken away by the petitioner and others and detained in the Mission House.

The facts are undisputed to this extent that the girl had lived with Radhakissen for a period of 9 or 10 months, and that on the 18th October she left his house and went to the Mission House, where she remained.

It also appears that while she was living with Radhakissen she was visited by and received instruction from the petitioner and a native teacher attached to the Mission.

On the part of the petitioner, it was denied that the girl was under 14 years of age, and that she was legally married to Radhakissen, and it was alleged that she was practically being brought up, with the connivance of the mother, to a life of prostitution.

The Magistrate took evidence and found that the girl was under 14; that she was legally married; and that, although she went to and remained in the Mission House of her own will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that no facts were established which would disentitle the husband or the mother to the charge of the girl. An order for restoration was accordingly made, and, with the consent of Radhakissen, the girl was made over to her mother. There is no reason to suppose that the facts have been wrongly determined by the Magistrate. There is ample evidence to support his conclusions, and the only question which we have to consider in connection with the order is whether, on the facts found, there was an unlawful detention for an unlawful purpose. Obviously the Magistrate is only empowered to act when the detention and the purpose are both unlawful.

Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this keeping and the refusal to give her up amounted to detention which was unlawful.

The question whether the purpose was unlawful is, however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate, finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words "unlawful detention for an unlawful purpose" as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. It might seem at first sight that the detention of a child, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would come within the meaning of the words as well as within the mischief which they were intended to provide against.

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But we think it is not so; and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

The purpose of forcing a woman to sexual intercourse would certainly be unlawful; the purpose of having sexual intercourse with a girl under 14, even with her consent, would, I take it, be equally unlawful within the meaning of this section, because the girl's consent would be immaterial. But it cannot be said that the purpose of enabling or persuading an adult woman to become a Christian would be in itself unlawful. If it is not unlawful in the case of an adult woman, it could only be unlawful in the case of a child by reason of its being done without the guardian's consent. But we think it is impossible to construe the section so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian.

The section was not enacted for the protection of children only or of children generally. It applies to women and to female children only, and this combination and the exclusion of male children, goes to show not only that some definite purpose, unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. This view is supported by the earlier legislation on the subject. The sections of the earlier Acts, corresponding to s. 551 of the Procedure Code, empowered the Magistrate to act when a woman or female child was detained for specified purposes; *viz.*, adultery, concubinage, prostitution, deflowering or disposing of her in marriage. The words "any unlawful purpose" were first substituted in Bengal Act IV of 1866 for the specified purposes mentioned in the previous Acts, and those words have been used in all the subsequent Acts, but the Magistrate's power has always been restricted to the case of women and female children. It may be that the effect of the alteration was to extend the scope of the section and to include some purposes other than those which were before distinctly specified, but it is unnecessary to consider whether this is the case; it is enough to say that the purpose which

is here found to have been entertained is not an unlawful purpose within the meaning of the section.

It follows that the Magistrate had no power to make the order which he did. The question remains whether, in setting it aside, we should undo what was done in giving effect to it and replace the girl in the charge of the person from whom she was taken. We have no hesitation in saying that if the Magistrate had the power which he supposed he had, he in our judgment exercised it very properly on the facts before him. It does not, therefore, follow that, because we now find he had not the power, we should, as a matter of course, restore the state of things which existed when the order was made.

We are in fact asked to take this child from the charge of her mother or husband, in the custody of one or other of whom she is, and either of whom the law regards as her natural and proper guardian, and make her over to a stranger whose detention of the child, against the will of her husband or mother, would be, *primâ facie*, unlawful. It is, we think, very questionable whether we have the power to do this; but, assuming that we have the power, we could only with propriety exercise it if the proper guardian is shown to be in some way disqualified, or if, at the least, the guardian's character is so bad and mode of life so immoral that it would not be proper to leave the child in his or her charge. Nothing of the sort is established. It is not even alleged that the mother has led or is now leading an immoral life. All that is charged is that, by giving her daughter to a man to whom she was not married, she abandoned her and left her to lead a life of prostitution. The truth of this charge depends upon the fact whether there was or was not a marriage. The Magistrate has found, on ample evidence, that there was a marriage, which would be valid if the parties were not incapable of contracting, and that there is no ground for holding that they were incapable. The marriage is said to be illegal because, according to caste custom, widows are not allowed to marry, and because one of the parties is of higher social status than the other. It is only necessary to point out that widow marriages are now legalised, and that, although a marriage may be improper according to caste custom, it is not on that account illegal.

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But the whole charge of immorality against the mother falls to the ground when it is found, as the Magistrate has found, that even if there was any legal defect in the marriage, this was unknown to the mother and Radhakissen, both of whom believed that a valid marriage had taken place.

With the religious aspect of the case we have, of course, nothing whatever to do. It matters not whether the case is one of a Hindu child leaving her parents and being received and detained against their will in a Christian institution in order that she may become Christian, or of a Christian child leaving her parents and being received and detained against their will in a Mahomedan institution in order that she may become a Mahomedan.

There are no circumstances which would justify us in ordering that the child should be made over to the petitioner, and the rule must, so far as it relates to this, be discharged.

H. T. H. *Rule made absolute in part.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

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March 18th.

HUKUM CHAND OSWAL (PLAINTIFF) *v.* TAHARUNNESSA BIBI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, 1882, s. 257A—Agreement for, or to give, time for satisfaction of judgment-debt—Agreement without sanction of Court—Illegal contract—Contract Act (IX of 1872), s. 23—Consideration.

The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and *T* his father, by which they both became liable for the amount of the decree with interest at 18¾ per cent. In a suit on the bond, it was contended that the bond was void under s. 257A of the Civil Procedure Code, as being an agreement to give time for the satisfaction of the judgment-debt made for no consideration and without the sanction of the Court, and also without such sanction providing

* Appeal from Appellate Decree, No. 2510 of 1887, against the decree of J. R. Hallet, Esq., Judge of Rungpore, dated the 1st of September 1887, affirming the decree of G. Dalton, Esq., Subordinate Judge of Julpaigoorce, dated the 11th of February 1887.

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for payment of a sum in excess of the amount due under the decree; that it was void within the meaning of s. 23 of the Contract Act as being forbidden by, or of a nature to defeat the provisions of, s. 257A of the Civil Procedure Code; and that, consequently, the suit on it was not maintainable.

Held, that s. 257A of the Code was not applicable. That section was framed to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, *in execution of the decree*, but was not intended to take away the right of parties, of entering into a fresh contract, either for payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than may be covered by the decree, if it be for a proper consideration. In this case the consideration for the bond was a lawful consideration: it could not be said that, because satisfaction of the decree was not certified to the Court, there was no consideration.

Held, also, the bond was not void under s. 23 of the Contract Act. *Semble*: The words "any law" in that section refer to some *substantive* law, and not to an adjective law, such as the Procedure Code is.

THE plaintiff obtained a decree against defendant No. 1, as widow of one Munshi Darwar Buksh, and, under that decree, the judgment-debtor was liable to pay the decretal amount by certain instalments specified in the decree, and interest was given by the decree at 4 per cent. per annum. She failed to pay, and the decree-holder then accepted a bond executed by Munshi Tarikulla, the father of the judgment-debtor, under which he became security for the ultimate payment of the amount of the decree. The decree was not satisfied, and in lieu of enforcing the bond against Munshi Tarikulla, the decree-holder eventually, on the 18th Bhadro 1289 (2nd September 1882), accepted a fresh bond executed by Munshi Tarikulla and his daughter, defendant No. 1, jointly, under which both became liable for the balance of the decree remaining unpaid and for interest at the rate of Rs. 1-9 per mensem or of Rs. 18-12 per cent. per annum. The defendants Nos. 2 to 10 were the other heirs of Tarikulla who was dead.

The main defence was that the bond of the 18th Bhadro 1289 was contrary to the provisions of s. 257A of the Civil Procedure Code, and that the suit to enforce it was not maintainable; and on this ground the suit was dismissed by both the lower Courts.

The plaintiff appealed to the High Court.

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Baboo *Rash Behari Ghose* and Baboo *Bhubun Mohun Dass* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Munshi *Seraj-ul-Islam* for the respondents.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows :—

A decree was obtained by the plaintiff against the defendant No. 1, as the legal representative of one Darwar Buksh, in respect of a certain sum of money. The decree provided that the amount was payable in instalments with interest at a certain rate. The defendant No. 1, however, failed to pay in accordance with the terms of the decree; and the plaintiff thereupon accepted a bond executed by the father of defendant No. 1, *viz.*, Tarikulla, as surety for the debt. But nothing apparently came out of this transaction, and eventually a bond was executed on the 18th Bhadro 1289, both by defendant No. 1 and Tarikulla, making themselves jointly liable for the balance of the decretal money with interest at Rs. 18-12 per cent. per annum. The original decree is not forthcoming, but there does not seem to have been any dispute between the parties in the lower Courts as regards its terms, excepting however in one particular, *viz.*, as to the rate of interest decreed. The Lower Appellate Court, upon the evidence, has found that the interest payable under the decree was Rs. 4 per cent. per annum, whereas that covenanted to be paid under the bond of the 18th Bhadro 1289 was, as already mentioned, Rs. 18-12.

The present suit is brought upon the bond of the 18th Bhadro 1289 both against defendant No. 1 and the heirs of Tarikulla, he having in the meantime died.

The suit has been dismissed by both the Courts below, upon the ground that under s. 257A of the Code of Civil Procedure the agreement entered into by the bond, providing for the payment of a larger interest than that payable under the decree, is void, the bond having been executed without the sanction of the Court which passed the decree.

We think that the lower Courts have not taken a right view of the law. It seems to us that it is only in the event of an application

being made to enforce the agreement entered into between the parties under the bond, in the course of the *execution of the decree*, that an objection like that now raised, could have been successfully made. Section 257A finds its place in the Procedure Code in the Chapter headed "Of the execution of decrees" under division E "Of the mode of executing decrees," and there can, therefore, be no reasonable doubt that what the Legislature had in view in framing that section was simply to prohibit the enforcement of an agreement of the kind mentioned therein, if made without the sanction of the Court, in execution of the decree; but it could never have been intended to take away a right which parties certainly possess of entering into a fresh contract, either for the payment of the judgment-debt, to give time for such payment, or for the payment of a larger sum than what may be covered by the decree, if it be for a proper consideration. In the present case the creditor agreed to give to the debtor more time for the payment of the decretal money than what the decree actually allowed; and the larger rate of interest agreed to be paid was evidently the consideration for the giving of such time. This consideration was certainly lawful and there can, therefore, be no valid objection to the agreement being enforced.

It was however contended, on the part of the respondent, that, under s. 23 of the Contract Act, the consideration for the agreement was not lawful, because it was forbidden by law, or was of such a nature that, if permitted, it would defeat the provisions of s. 257A of the Code of Civil Procedure. We are unable to accept this contention. In the first place, we are not aware of any law by which such a consideration, as there was for the bond in this case, is forbidden; and, in the second place, we do not think that "if permitted" it would defeat the provisions of s. 257A. The words "any law" as mentioned in s. 23 of the Contract Act, we are inclined to think, refer to some *substantive* law, and not to an adjective law such as the Procedure Code is. But whether this is so or not, we fail to see how the object, with which s. 257A was framed, would be defeated, if the contract in question were enforced, that object being, as it seems to us, simply to avoid the inconvenience

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and delay which would arise if parties were allowed to bring, before the Court executing a decree, matters not covered by it and which had not become part of the decree itself by express sanction of the Court.

It was further contended on behalf of the respondent that, inasmuch as the satisfaction of the decree was not certified to the Court, there was no consideration for the bond, and it would still be open to the decree-holder to enforce the decree. There is nothing on the record showing whether satisfaction of the decree was certified or not; but assuming that it was not, we do not think that it can be rightly said that there was no consideration for the contract; and it seems to us that if, notwithstanding the acceptance of the bond by the creditor in lieu of the decree, he enforces the decree, there is a remedy in the hands of the debtor to recover back from the creditor the money realized in execution of the decree with such damages as he might have sustained by reason of the wrongful act of the creditor.

The view that we take of this case is supported by the cases *of Jhabar Mahomed* v. *Modan Sonahar* (1), *Sellamayyan* v. *Muthan*, (2), *Ramghulam* v. *Janki Rai* (3), and *Gunamani Dasi* v. *Prankishori Dasi* (4), and we may say that we are not prepared to follow the view which the Bombay High Court has laid down on the subject.*

We accordingly are of opinion that the suit will lie, and that, therefore, it must be returned to the Court of first instance to be tried on the merits. The plaintiff is entitled to his costs in this Court and the Lower Appellate Court, and he is entitled also to a refund of the stamp-fee on the petitions of appeal to this Court and to the District Judge.

J. V. W. *Appeal allowed.*

* See *Pandurang Ramchandra Chowghule* v. *Narayan*, I. L. R., 8 Bom. 300; *Ganesh Shivram* v. *Abdullabeg*, I. L. R., 8 Bom., 538; *Davlat Sing* v. *Pandu*, I. L. R., 9 Bom., 176; and *Vishnu Vishwanath* v. *Hur Patel*, I. L. R., 12 Bom., 499.

(1) I. L. R., 11 Calc., 671.
(2) I. L. R. 12 Mad., 61.
(3) I. L. R., 7 All., 124.
(4) 5 B. L. R., 223.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

TOPA BIBI (DEFENDANT) *v.* ASHANULLA SARDAR (PLAINTIFF).* 1889 *March* 15.

Registration Act (III of 1877), s. 77—Suit to compel registration of document not compulsorily registrable.

Under the Registration Act of 1877, a suit lies by a purchaser to compel registration of his kobala in a case in which the value of the property conveyed is under Rs. 100, and in which, therefore, the registration of the deed is not compulsory.

THIS was a suit brought under s. 77 of the Registration Act to compel registration of a kobala or deed of sale alleged to have been executed by the defendant in favour of the plaintiff. The defendant denied execution and the Registrar consequently refused to register the deed. The only question material to this report was, whether or not the suit would lie. The Munsiff came to the conclusion that the defendant had not executed the kobala, and therefore dismissed the suit. This decision, however, was reversed by the Judge, who gave the plaintiff a decree for the registration of the deed.

The defendant appealed to the High Court.

Baboo *Debendra Mohun Sen*, for the appellant, contended that the suit would not lie and cited an *Anonymous case* (1) and *Ahsuna* v. *Begum Kheerun Singh* (2).

Baboo *Mukunda Nath Roy*, for the respondent, contended that such a suit would lie, and referred to ss. 17, 18, 50 and 77 of the Registration Act, 1877, and para. 3 of s. 54 and cl. (*d*) of s. 55 of the Transfer of Property Act.

The judgment of the Court (PRINSEP and WILSON, JJ.) was delivered by—

WILSON, J.—The only question argued before us, and the only one properly open upon second appeal, is, whether a suit will lie on the part of a purchaser to compel registration of his kobala in a

* Appeal from Appellate Decree No. 517 of 1888, against the decree of J. R. Hallet, Esq., Judge of Rungpore, dated the 3rd of December 1887, reversing the decree of Baboo Gopal Chander Banerjee, Munsiff of Gaibandah, dated the 14th of February 1887.

(1) 6 Mad. H. C. Ap., 9. (2) 10 W. R., 360.

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case in which the value of the property conveyed is under one hundred rupees, and registration is therefore not made compulsory by the Registration Act.

We think it clear that under the present Registration Act III of 1877 the suit lies. Section 17 of the Act says "that certain documents shall be registered." Section 16 says "that certain other documents may be registered." Section 32 says that "every document to be registered . . . . . whether such registration be compulsory or optional, shall be presented . . . . . by some person executing or claiming under the same." The effect seems to be that any person therein described may exercise the option given by s. 18. The following sections lay down rules as to whose presence is ordinarily necessary to justify registration. And ss. 36 to 39 provide for compelling the attendance of such persons as well as of witnesses. Part XII of the Act, dealing with the mode of refusal to register and its consequences, with appeals against such refusal, and in the last resort a suit in a Civil Court, is perfectly general in its terms.

Two cases were cited as authorities for a contrary view *Ahsuna Begum* v. *Kheerun Singh* (1) and an *Anonymous case* (2) from the Madras High Court Reports. As to those cases it is enough to say that the Judges had in them to deal with a different Act from that now before us, and especially different in this, that it did not expressly give a right of suit as the present Act does. Under the present Act we entertain no doubt that the suit lies. Any other conclusion would lead to very grave consequences; for since the passing of the Transfer of Property Act the omission to register documents of the kinds mentioned in s. 18 of the Registration Act may lead to much more serious results than before. The appeal is dismissed with costs.

Appeal dismissed.

(1) 10 W. R., 360. (2) 6 Mad. H. C. Ap., 9.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

KRISTO GOBIND MAJUMDAR (JUDGMENT-DEBTOR) *v.* HEM CHUNDER CHOWDHRY (DECREE-HOLDER).

KRISHNA GOPAL MAJUMDAR (JUDGMENT-DEBTOR) *v.* HEM CHUNDER CHOWDHRY (DECREE-HOLDER).* 1889 *March* 19.

Execution of decree—Personal decree against person having life interest—Decree for arrears of rent—Hindu law.

A decree for arrears of rent was obtained by *H* against *B*, a daughter in possession for a life estate of property inherited from her father *R*. On the death of *B*, this property was taken by her two sons as heirs of her father *R*. The decree was for arrears which had accrued during the lifetime of *B*, and the sons had been substituted for *B* as judgment-debtors.

On an application for execution of the decree: *Held*, on the principle laid down in *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (1), that the debt was a personal debt, payment of which could be enforced only against the property left by *B*. The decree, therefore, could not be executed against the property inherited by the sons from *R*.

Hurry Mohun Rai v. *Gonesh Chunder Doss* (2) distinguished.

IN these cases Hem Chunder Chowdhry had obtained a decree for arrears of rent against (among others) one Brojosundari Dassia, the daughter and heiress of one Rama Kanto Majumdar. Brojosundari having died, her two sons, Krishna Gopal Majumdar and Kristo Gobind Majumdar, succeeded to the property of Rama Kanto, their maternal grandfather, in which Brojosundari, their mother, had had a life interest, and were substituted as judgment-debtors in place of Brojosundari. In execution of his decree, Hem Chunder applied for attachment and sale of a taluk other than that in respect of which the arrears had accrued. Krishna Gopal and Kristo Gobind objected to the sale of a four-anna share of the taluk, being the portion to which they had succeeded as heir of Rama Kanto.

It was found by both the lower Courts, that the arrears of rent in respect of which the decree was obtained against Brojosundari,

* Appeals from Orders Nos. 415 and 421 of 1888, against the orders of H. Peterson, Esq., Judge of Mymensingh, dated the 26th of July 1888, reversing the orders of Baboo Koruna Moy Banerjee, Subordinate Judge of Mymensingh, dated the 10th of April 1888.

(1) L. R., 2 I. A., 275; I. L. R., 1 Calc., 133.

(2) I. L. R., 10 Calc., 823.

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had accrued during her lifetime. The Subordinate Judge held that the four-anna share was not liable to be sold.

On appeal however the Judge, relying on the Full Bench case of *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (1), held that the portion of the taluk held by Krishna Gopal and Kristo Gobind was liable to be sold in execution of the decree.

From this decision Krishna Gopal and Kristo Gobind brought separate appeals to the High Court.

Baboo *Mukunda Nath Roy* and Baboo *Jadub Chunder Seal* for the appellants.

Baboo *Mohini Mohun Roy* and Baboo *Jogesh Chunder Roy* for the respondent.

Baboo *Mukunda Nath Roy* for the appellants.—The decree against Brejosundari was a personal decree against her. The reversioners were not parties to the suit in which the decree was obtained. The debt was purely a personal debt of their mother, and a purely personal decree was obtained. The cases of *Kristo Moyi Dossee* v. *Prasanna Narayan Chowdhry* (2), *Mohima Chunder Roy Chowdhry* v. *Ram Kishor Acharj Chowdhry* (3), *Nogendro Chunder Ghose* v. *Kaminee Dossee* (4), and *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (5) were cited.

The Full Bench case of *Hurry Mohun Rai* v. *Gonesh Chunder Doss* (1) is not applicable to the present case.

Baboo *Mohini Mohun Roy*, for the respondent, contended that the property of the reversioners was liable to be sold in execution of the decree, and cited *Teluck Chunder Chuckerbutty* v. *Muddon Mohun Joogee* (6) and *Anund Moyee Dassee* v. *Mohendro Narain Dass* (7).

(1) I. L. R., 10 Calc., 823.
(2) 6 W. R., 304.
(3) 15 B. L. R., 142, note; 23 W. R., 174.
(4) 11 Moore's I. A., 241.
(5) L. R., 2 I. A., 275; I. L. R., 1 Calc, 133.
(6) 15 B. L. R., 143, note; 12 W. R., 504.
(7) 15 W. R., 264.

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The judgment of the Court (PRINSEP and WILSON, JJ. was) as follows:—

Decrees for arrears of rent were obtained against Brojosundari, a Hindu widow, which are now put into execution after her death against properties forming her father's estate in which she had only a life interest. The question raised on these appeals is, whether they are decrees merely against her personally, and, therefore, to be satisfied out of whatever she left at her death, or whether the estate which has passed to the next heirs, is liable.

We are of opinion that the principle laid down by their Lordships of the Privy Council in the case of *Baijun Doobey* v. *Brij Bhookun Lall Awusti* (1) should be adopted, and that the debt cannot be regarded as other than a personal debt, payment of which can be enforced only against the property left by the widow. The case decided by the Full Bench of this Court—*Hurry Mohun Rai* v. *Gonesh Chunder Doss* (2)—is not in point, as the debt of the Hindu widow was contracted under different circumstances, such as were held by the majority of the Judges to bind the ancestral estate. We accordingly set aside the order of the lower Courts with costs.

Appeals allowed.

J. V. W.

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABHAYESSARI DEBI (PETITIONER) *v.* SHIDHESSARI DEBI (OPPOSITE PARTY).*

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Criminal Procedure Code Act X of 1882, s. 145—*Dispute as to right to collect rents—Tangible immoveable property.*

A dispute as to the right to collect rents is a dispute concerning tangible immoveable property within the meaning of s. 145 of the Criminal Procedure Code, and the operation of that section cannot be limited by any rule which would depend upon the area of the property in dispute.

* Criminal Motion No. 19 of 1889, against the order passed by G. Godfrey, Esq., Deputy Commissioner of Goalpara, dated the 29th of December 1888.

(1) L. R., 2 I. A., 275; I. L. R., 1 Calc., 133.
(2) I. L. R., 10 Calc., 823.

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Where, in such a dispute, which related to two pergunnahs comprising more than three hundred distinct villages, it was admitted by the petitioner that the opposite party had been in possession by receipt of rent from the tenants up to a period some three months anterior to the institution of the proceeding, but she alleged that she had succeeded in inducing the tenants to attorn to her by payment of rent to the officers appointed by her since such period; and where the Deputy Commissioner, after recording a certain amount of evidence, refused to examine any more witnesses, on the ground that the enquiry would extend to an inordinate length and be extremely expensive, and passed an order under the section—

Held, that even though it might be established that the Deputy Commissioner's action in excluding evidence was illegal, it did not follow, having regard to the circumstances of the case, that the High Court would be justified in exercising its revisional powers.

Held, further, that a payment of rent for a short time to the petitioner, even if proved, would not amount to dispossession of the opposite party. *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (1) followed.

THIS application arose out of a proceeding under s. 145 of the Criminal Procedure Code, instituted in the Court of the Deputy Commissioner of Goalpara, between the two Ranis of the late Raja of Bijni, the property in dispute consisting of two pergunnahs, Habraghât and Khotaghât, in which there were several hundred villages with a population of over 100,000 persons, and of which the assessment at one time appeared to have been about two lakhs of rupees. The pergunnahs formed a substantial portion of the Bijni Estate, and each of the Ranis claimed to be entitled to succeed thereto and to possession thereof to the exclusion of the other. The late Raja died on the 9th March 1883, and these proceedings were instituted on the 23rd May 1887.

Considerable delay took place owing to various applications being from time to time made to the High Court, and owing to a Receiver of the whole estate having been appointed by the Court of first instance in a civil suit filed by the second party. Ultimately an appeal was preferred to the High Court against the order appointing a Receiver, and, as the hearing of that appeal was delayed and numerous police reports as to the likelihood of a breach of the peace occurring were made, the Deputy Commissioner ordered these proceedings under s. 145 to be continued. Ultimately after other applications to the High Court, the Deputy

(1) I. L. R., 15 Calc., 527.

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Commissioner on the 29th of December 1888 passed an order declaring Rani Shidhessari Debi to be in possession of the two pergunnahs and entitled to retain such possession until ousted by due course of law, and forbidding any disturbance of her possession, and ordering the second party to pay the costs. The main facts of the case and the various proceedings had in the matter are sufficiently stated in the judgment of the High Court. The material portion of the judgment of the Deputy Commissioner, delivered when the order was passed, was as follows:—

"The case was instituted on the 23rd May 1887, and proceedings have been delayed on account of references to the High Court, on account of a Receiver having been appointed by the Judge, and the inability of the Magistrate to go on with the case pending final orders regarding that appointment. The delay in a case, which by its very nature requires a prompt order, is very extraordinary and very anomalous.

"I am asked by the first party, Rani Shidhessari, or the elder Rani, to find that she was in exclusive possession of the pergunnahs on the date of institution of these proceedings, and I am asked by the second party, Rani Abhayessari, or the younger Rani, to find that she was in exclusive possession of the estate with the exception of a very few villages, in which possession was divided and of a few villages in which the first party's possession is admitted. Possession I take to be in the main the enjoyment in whole or in part of the profits arising from the soil, notably the rents paid by cultivators. Evidence of receipt of rents has been adduced by both parties, and there is no doubt that, when these proceedings were instituted, many of the ryots paid rent to the first party, and many paid rent to the second party, and many of course paid no rents at all to any one.

"I have nothing to do with the means by which possession was obtained by the second party, or whether that possession was wrongful or not, so long as it was a peaceable possession.—*Ambler* v. *Pushong* (1) and *Bunwari Lall Misser* v. *Raja Radha Pershad Singh* (2).

Both parties have adduced the evidence of witnesses as to the payment of rents and both have filed masses of counterfoil cheque

(1) I. L. R., 11 Calc., 365. (2) 1 C. L. R., 136.

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receipts, *amdanis*, and other papers in support of their respective contentions, and I have no reason for discrediting the papers that have been filed. Supposing the dispossession of the first party to have been followed by peaceable possession on part of the second party, that is, supposing the first party could be regarded as having been dispossessed at all—it would be necessary to ascertain the fact of possession in all the holdings and mouzahs comprised in the two pergunnahs. Such an inquiry would be impracticable and hopeless.

"Assuming then, for the sake of argument, that dispossession in part followed by peaceable possession has taken place, I should have to look to the question of title in order to guide me to a decision, because it is quite impossible to ascertain who was *de facto* in possession of each mouzah and holding in the estate, or else I should have to attach the whole estate under s. 146.

"I will refer to the question of title later on, suffice it to say, that I cannot find the second party to have any title to possession, still less to exclusive possssion. It is true that the first party cannot apparently recover rents from the cultivators that fell due after 1st July 1886, when the Assam Land and Revenue Regulation came into force, because she is not registered under that Regulation but only under Regulation VIII of 1800.—*Brojo Nath Chowdhry* v. *Birmoni Singh Monipuri* (1). Still she is able to sue for rents that were due on the 30th June 1886, and so she had the legal right to recover rents for two years when these proceedings commenced. The second party had no such right at all. So far, therefore, as this right to recover rents is an index of title and of possession, it certainly lies with the first party and not with the second party. The fact of non-registration under Regulation I of 1886 is not, I think, tantamount to an absence of possession, which is clearly something more than the legal right to recover rents due from cultivators. I have shown that such a right does vest, to some extent, in the first party, and I do not think that I should be justified in the circumstances to proceed to attachment of the two pergunnahs.

"It is admitted that, when this case was instituted, the first party was the sole registered proprietor; that all suits for or against

(1) I. L. R., 15 Calc., 527.

the Bijni estate were carried on in her name ; that she paid the Government revenue on the estate and the local rates ; that, prior to February 1887, all the business of the estate was managed by her alone, she appointed and dismissed the officers of the estate, issued parwanas in her own name and bearing her own seal, and that the name of the second party did not enter into any of these proceedings, and that she alone was in receipt of rent from the ryots ; also, that when these proceedings commenced she was in possession of the Rajbari, of all the moveable property left by the deceased Raja, and of all the old tahsil cutcherries of the estate. The second party set up her right to exclusive possession in February 1887, and without doubt many of the ryots went over to her and paid her rents and presented her with *nuzzurs ;* but these ryots had up to that time been paying rent to the first party and the first party has never acquiesced in the change. All kinds of disturbances arose in consequence of the subversion, as far as it went, of the existing order of things ; so that such possession, as the second party obtained, cannot be called a peaceable possesion.

"On behalf of the second party the contention is raised that she and the first party were joint proprietors ; that they were actually joined as one party in the case under s. 145, Criminal Procedure Code, of *Empress* v. *Chandra Narayan Subhá* (first party) and *Rani Sidhessari Debi* and *Rani Abhayessari Debi* (second party) ; that therefore the second party had a joint interest in all the lawsuits in which the Estate was concerned ; that all collections of rent were made on her behalf jointly with the first party ; that in fact the first party was acting merely as manager or head of the family, and that she cannot be presumed to have been acting in her own sole interest or to have a sole interest in the estate ; and that, therefore, the possession of the second party was a lawful and proper possession, and it is immaterial whether the first party acquiesced in it or not.

"On the other hand, there are the facts already referred to in support of the position that the first party was the sole proprietor ; and it may be stated that the first party has always admitted the second party's interest in the estate to the extent of a right to maintenance out of the funds of the estate, but she has never

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admitted the position that the second party is a co-sharer. The point was not raised, and was not in issue in the case of *Chandra Narayan Subha* above referred to, and so it cannot be taken to be *res judicata*. The two Ranis were at that time living amicably together, and so far as the younger Rani's claim to maintenance went of course she had an interest in the estate. It is quite probable that the elder Rani and her advisers never supposed that the fact of the two names being joined as one party would ever give rise to a claim of co-ownership. Of course there is the well-known presumption of Hindu law that the status of a Hindu family must be presumed to be joint till the contrary is proved, but in this case the family is that of a Raja. The registration of name was effected by the Rani Sidhessari as Pat Rani. She alone has been recognised by Government as the proprietor of the estate. She has for years appeared before the public in that capacity and Rani Abhayessari has, so to speak, been a mere outsider. In view of all these circumstances, I am unable to presume that the interest of the second party in the Bijni estate was that of a co-owner, and I cannot find that she had any right to possession as against the first party. To sum up, the possession of the first party has been disturbed by the second party, but that disturbance of possession has not heen acquiesced in by the first party, and I am not bound to recognise the sort of dispossession that has taken place. But even if the second party has acquired partial possession, as indicated by the enjoyment of rents paid by cultivators, I cannot find that the second party has any title. I find that so far as rents are concerned, the first party was in possession exclusively up to February 1887; that she alone was in possession on the date of the institution of these proceedings so far as the right to recover rent at all may be disputed between the parties, that is, she alone could recover the rents that fell due before the 1st July 1886. I also find that so far as recognition by Government and the payment of Government dues, the possession of the Rajbari and of all the old tahsil cutcherries are an index of possession, the first party was in possession when these proceedings commenced.

"Lastly, I may say, that the fact of ryots of the first party going over to the second party, without the consent and against the will

of the first party, does not constitute an adverse possession, that as the first party never acquiesced in this attornment of her ryots her possession never in fact ceased.—(*Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri*. (1.)"

Rani Abhayessari Debi, the second party, being dissatisfied with that order, accordingly applied to the High Court, under s. 439 of the Criminal Procedure Code, to send for the record and to set aside the order upon numerous grounds the nature of which appear sufficiently for the purpose of this report in the judgment of the High Court.

Upon this application a rule was issued which now came on for hearing.

Mr. *Woodroffe*, Mr. *Evans*, Mr. *M. M. Ghose*, Mr. *A. M. Bose*, Baboo *Durga Mohun Dass*, Baboo *Ambika Charan Bose*, Baboo *Boikanta Nath Dass*, and Baboo *Chandra Kanto Sen*, for the petitioner.

The *Advocate-General* (*Sir G. C. Paul*) Mr. *H. Bell*, Baboo *Iswar Chunder Chuckerbutty*, and Baboo *Kretanto Kumar Bose* for the opposite party.

The nature of the arguments advanced at the hearing of the rule appear sufficiently for the purpose of this appeal from the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows:—

This rule arises out of a proceeding under s. 145 of the Criminal Procedure Code instituted in the Deputy Commissioner's Court of Goalpara, between the two Ranis of the late Koomood Narain Bhoop, Raja of Bijni.

It appears that the aforesaid Raja died on the 9th March 1883, when the second party, junior Rani, was about 19 years of age. The elder Rani, the first party, was allowed by the authorities to assume management of the estate left by the Raja, which consisted of two very extensive pergunnahs, *viz.*, Habraghât and Khotaghât, comprising over 300 villages. It is admitted that the first party remained in sole possession of the said two pergunnahs from the death of the Raja to the month of February 1887 by receipt of rent from the tenants of the said pergunnahs.

(1) I. L. R., 15 Calc., 527.

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The second party lived in the *Rajbari* with the first party till August 1886. About that time there having arisen a serious difference between the two Ranis, the second party left the Rajbari.

It is alleged by the second party that the first party, for certain reasons to which it is not material in these proceedings to refer in detail, has no title to the Raj, which, by the law of inheritance, vested in her alone upon the death of the late Raja.

It is further alleged by the second party that she, being alone entitled to the whole Raj, took measures from the month of February 1887 to assume exclusive possession of the aforesaid two pergunnahs.

On the second party attempting to take possession of the two pergunnahs, the first party made an application to the Deputy Commissioner of Goalpara, to institute proceedings under s. 145 of the Criminal Procedure Code, alleging that there was a likelihood of a serious breach of the peace in consequence of the endeavours of the *amlas* of the junior Rani to collect rents forcibly from the tenants. The statement regarding probability of the breach of peace was confirmed by many police reports. Thereupon the Deputy Commissioner instituted the present proceeding on the 23rd of May 1887.

The second party moved this Court on the 28th May 1887 to set aside the order of the 23rd May, on the ground that there was no valid reason stated in it for initiating proceedings under s. 145 of the Criminal Procedure Code. A rule was issued by this Court upon that application, but it was discharged on the 28th June 1887 on the ground that, upon the materials then before the Court, there was nothing to show that the Magistrate had no authority to take proceedings under s. 145 of the Criminal Procedure Code.

On the 19th July 1887 the parties filed their written statements. The second party in her written statement, amongst other things, alleged that she had instituted a civil suit regarding the Raj, and that on her application, dated the 15th July a rule had been issued upon the first party to show cause why a Receiver should not be appointed to collect the rents and otherwise manage the estate left by the late Raja. She further

stated that she was in exclusive possession of almost the whole of the Pergunnahs Habraghât and Khotaghât, the tenants having of their own accord and without any coercion paid rent to the *amlas* appointed by her.

It appears that the rule regarding the appointment of a Receiver was disposed of by the lower Court by an order appointing a Receiver as prayed for by the second party. Against that order an appeal was preferred to this Court. The Deputy Commissioner being of opinion that the appointment of a Receiver would do away with the necessity of the continuance of this proceeding, by an order dated 13th of August 1887, suspended all further proceedings in it till the disposal of the appeal against the order appointing a Receiver. But the appeal not having been heard, in consequence of frequent applications for postponements and the parties having in the meantime attempted to collect rents, the Deputy Commissioner on receipt of police reports of the likelihood of a breach of the peace occurring, by an order dated 7th of May 1888, directed that the case under s. 145 of the Criminal Procedure Code, be proceeded with. Against that order the second party made an application to this Court on the 26th May 1888. About that time, the second party also made another application to this Court praying that the proceeding, under s. 145 of the Criminal Procedure Code be wholly set aside, as she had instituted a regular suit for the establishment of her title to the Raj. Both these applications were unsuccessful and this Court directed the Deputy Commissioner to proceed with the trial of the proceeding under s. 145 of the Criminal Procedure Code.

The proceedings being resumed, both parties cited numerous witnesses to prove their respective allegations of possession over more than 300 villages. But the Deputy Commissioner being of opinion that it was the intention of the Legislature that a proceeding like this, instituted for the maintenance of peace, should be speedily terminated, declined to examine more than a limited number of witnesses on each side. He decided on the evidence taken by him in favour of the first party. This rule was issued on the application of the second party to set aside the order of the Deputy Commissioner of Goalpara on various grounds.

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The questions argued before us, and which in our opinion are sufficient to dispose of this rule, are as follows :—

1st.—That a single proceeding under s. 145, Criminal Procedure Code, was not intended to be applicable to a case like this in which the question of disputed possession related to more than 300 distinct villages.

2ndly.—That on the date fixed for the filing of written statements, the second party was desirous of adducing evidence to prove that there was no likelihood of a breach of the peace, but such evidence was illegally excluded.

3rdly.—That the lower Court acted illegally in declining to examine more than a limited number of witnesses on the question of possession.

In dealing with these questions it is to be borne in mind that the inquiry, if it had not been limited in the way in which it was limited by the Deputy Commissioner, would have lasted for a very long time, and would have been extremely expensive to both parties. That in all probability the civil suit would have been decided before the termination of this proceeding. That even if it had been decided before the disposal of the civil suit, very little advantage would have been gained thereby, as the decree in the civil suit would have made the decision on the question of possession quite ineffectual.

It seems to us, therefore, that even if it be established that the lower Court's action in excluding evidence was illegal, it would by no means follow that we should be justified in exercising our revisional powers on the ground of illegality.

But apart from this consideration the objections noticed above are not, in our opinion, such as would warrant our interference with the order of the lower Court.

With reference to the first two objections, it is sufficient answer to them, that in more than one application, which was made by the second party to this Court, in order to set aside the proceeding of the lower Court, these objections were not taken, and the last order made by this Court directing the lower Court to proceed with the trial of this case precludes her from raising them now. It has been decided by this Court that a proceeding under s. 145 is not limited to disputed possession

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between parties in immediate occupation of a tangible immoveable property, but is intended to apply where the disputed possession consists of receipt of rent from tenants in actual possession. That being so, we cannot limit its operation by any rule which would depend upon the area of the property in dispute.

It remains now to notice the third objection. It seems to us that, having regard to the admission made by the second party, that the first party was in possession of the two disputed pergunnahs till the month of February 1887, by receipt of rent from the tenants, it would not have affected the decision of the case at all, if it had been established that the second party, as alleged by her, had succeeded in inducing the tenants of almost the whole of the pergunnahs Habraghât and Khotaghât "to attorn to her by payment of rent to the officers appointed by her between the month of February 1887 and the following month of May, when the present proceeding was instituted." Such payment of rent for a *short* time would not amount to dispossession of the first party.

In this view we are supported by *Sarbananda Basu Mozumdar* v. *Pran Sankar Roy Chowdhuri* (1).

We are, therefore, of opinion that this rule must be discharged, and it is accordingly discharged.

H. T. H. *Rule discharged.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

GOPAL CHUNDER SREEMANY (PLAINTIFF) *v.* HEREMBO CHUNDER HOLDAR AND OTHERS (DEFENDANTS).*

1889 *March* 18.

Mortgage—Priority of mortgage—Intention of preserving a prior security presumed—Mortgagee—Mortgagor.

On the 29th November 1882, *H* mortgaged to the plaintiff his one-third share in a house and garden to secure Rs. 1,000 with interest at 12 per cent.

On the 3rd January 1884, *H* mortgaged his one-third share in the same house to a third person to secure Rs. 1,000 with interest at 18 per cent.

* Original Civil Appeal, No. 29 of 1888, against the decree of Mr. Justice Trevelyan, dated the 21st of August 1888.

(1) I. L. R., 15 Calc., 527.

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On the 14th May 1884, *H* and his two brothers mortgaged to the plaintiff the entirety of the said house and garden to secure Rs. 3,400 with interest at 18 per cent.

This last mortgage recited the mortgage of the 29th November 1882, and a further loan of Rs. 100 by the plaintiff to *H*, and contained the following clause, "Now in order to liquidate the said debt, and on account of our necessity, we three brothers do this day mortgage to you whatever right, title and interest we have in the said two premises and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we are paying at the rate of Re. 1-8 per month."

Held, that the transaction of the 14th May 1884, did not amount to payment of the original debt, but was in reality a further advance and a fresh security for both the old debt and the fresh advance, on different terms as to interest, the old debt remaining untouched; but that even had the original debt been satisfied thereby, that fact would not have necessarily destroyed the security, the presumption being, unless an intention to the contrary were shown, that the plaintiff intended to keep the security alive for his own benefit.

Gokaldas Gopaldas v. *Puranmal Premsukhdas* (1) followed in principle.

ON the 29th November 1882, Herembo Chunder Holdar mortgaged to Gopal Chunder Sreemany, under a Bengali instrument of mortgage, an undivided one-third share in the house and premises No. 15, Nimoo Gossain's Lane in the town of Calcutta, and of, and in, a certain rent-free garden in the 24-Pergunnahs, to secure the repayment of Rs. 1,000 with interest at 12 per cent. per annum. On the 3rd January 1884, Herembo Chunder Holdar granted a mortgage of his one-third share in the said house to Bindobashinee Dossee to secure the repayment of Rs. 1,000 with interest at 18 per cent. per annum. Bindobashinee Dossee brought a suit on this last mortgage against Herembo Chunder Holdar alone, and obtained therein, on the 26th November 1886, a decree directing the repayment of the sum secured with interest and costs, and in default directing the mortgaged premises to be sold.

Prior to the 14th May 1884 (at which date Gopal Chunder Sreemany had received no notice of the mortgage to Bindobashinee Dossee), Herembo Chunder Holdar, being unable to repay to Gopal Chunder Sreemany the amount due upon his first mortgage, applied to him to continue the said loan and to make further advances, which the said Gopal Chunder Sreemany agreed to do, provided that Sarat Chunder and Benayak Chunder Holdar,

(1) I. L. R., 10 Calc., 1035.

the owners of the remaining two-third shares in the said properties, would join in giving to him the security of their shares; and on the 14th May 1884, Herembo Chunder, Sarat Chunder and Benayak Chunder Holdar, mortgaged to Gopal Chunder Sreemany their shares in the said house and garden to secure the repayment of Rs. 3,400 with interest at 18 per cent. per annum.

This latter mortgage (which was a Bengali mortgage) after reciting the mortgage of the 29th November 1882, and the fact that a further advance of Rs. 100 had been made to Herembo Chunder, ran as follows: "In order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt." The mortgage of the 29th November 1882, however, was never in reality paid off, and it remained uncancelled in the hands of Gopal Chunder Sreemany.

On the 11th September 1888, Gopal Chunder Sreemany brought a suit on the mortgage of the 14th May 1884, making Herembo Chunder Holdar, his two brothers and Bindobashinee Dossee, defendants, praying that the mortgage of the 14th May 1884 might be declared to have priority over the mortgage of Bindobashinee Dossee, and that an account might be taken of what was due to him under the two mortgages of the 29th November 1882 and the 14th May 1884, and that Bindobashinee Dossee might be restrained from proceeding under the decree obtained by her.

The Holdar defendants put in written statements, which, however, set up no real defence; and Bindobashinee Dossee contended that, upon the proper construction of the mortgage of the 14th May 1884, the prior mortgage of the 29th November 1882 was extinguished; and she contended that her mortgage should have priority over the mortgage of the 14th May 1884.

TREVELYAN, J.—The only real question in this case is whether by taking a subsequent mortgage the plaintiff has lost his security under his first mortgage. (Here followed the facts as set out above.)

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The plaintiff is taking a new security from his original mortgagor and others; the interest charged is different. The new mortgage states that the debt has been paid off. The old deed remains with the mortgagee, but only as one of the title deeds: this is clear from the schedule of title deeds which includes it, and describes it as being paid in full. A comparison of this schedule with the schedule of the first mortgage, shows that this is one of the bonds described in the schedule of the second mortgage as having been paid in full.

This suit is brought for the purpose of declaring that the plaintiff's mortgage has priority over the mortgage of Bindobashinee.

Mr. *Sale*, for the plaintiff, has cited several cases, all of which I have considered. They are mostly cases of third mortgagees or purchasers of the equity of redemption, paying off the first mortgagees. As pointed out in the case of *Gopee Bundhoo Shantra Mohapattur* v. *Kallypudo Banerjee* (1), the question is one of intention; in that case the Judges relied upon the fact that the original bond remained in the hands of the creditor, but in this case it only remained as one of the title deeds. It seems to me quite clear the parties intended that the first mortgage should be wiped out altogether by the subsequent mortgage in favour of the plaintiff.

If that was their intention, they could not have expressed it in clearer language. There is the statement that the new loan is taken to liquidate the former debt. There is the statement that the old debt has been paid, and we find the old bond in the list of the title deeds, with a statement that it has been paid in full. In this state of facts it is impossible to say that the original security remained. A new contract of an entirely different description, and with a different rate of interest, was made with new persons. I think the intention is clear, and must declare that the plaintiff's first mortgage has no priority over the defendant Bindobashinee's mortgage. I must dismiss this suit, and the plaintiff must pay Bindobashinee's costs.

The plaintiff appealed.

Mr. *Phillips* and Mr. *Sale* for the appellant.

(1) 23 W. R., 338.

Mr. *Bonnerjee*, Mr. *Garth* and Mr. *Pogose* for the respondents.

Mr. *Phillips*.—The question is whether the first mortgage is extinguished. There is no evidence of express intention either one way or the other. I submit the first mortgage was kept alive. The plaintiff made further advances and naturally required a better security; and the fact of taking a second mortgage did not show that he meant to lose any advantage he might have had under his first mortgage. There is a broad distinction between the case of a purchaser of an equity of redemption and a mortgagee. Slight evidence suffices to keep on foot the prior charge. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1).

The nearest case on the facts is that of *Golaknath Misser* v. *Lalla Prem Lal* (2), but the present case is even stronger than that, as here the plaintiff's interest was raised, whilst in that case it was diminished.

The case of *Adams* v. *Angell* (3) is not so strong as the present case, as it was a case of a mortgagee purchasing the equity of redemption. The rule applicable to such cases as the present is laid down in Dart's Vendors and Purchasers, 1041: *Phillips* v. *Gutteridge* (4); *Gangadhara* v. *Sivarama* (5); *Dullabhdas Devchand* v. *Lakshmandas Sarupchand* (6).

The Court below has not only disallowed priority to the plaintiff's mortgage but has dismissed the suit altogether, which is clearly wrong as regards the mortgagors, and has also refused the plaintiff an account.

Mr. *Bonnerjee*, for the respondents, contended that the second mortgage clearly showed the intention of giving up the first security, and cited *Averrall* v. *Wade* (7).

The judgment of the Court (PETHERAM, C.J., and WILSON, J.) was as follows:—

This suit has been brought to have it declared that two mortgages, dated the 29th of November 1882 and the 14th May 1884,

(1) I. L. R., 10 Calc., 1035.
(2) I. L. R., 3 Calc, 307.
(3) L. R., 5 Ch. D., 634 (641.)
(4) 4 De G. and J., 531.
(5) I. L. R., 8 Mad., 246.
(6) I. L. R., 10 Bom., 88.
(7) L. & G. (temp Sug.), 252.

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in favour of the plaintiff, have priority over a mortgage, dated 3rd of January 1884, in favour of the defendant, Bindobashinee Dossee, and to realize such two mortgages by bringing the mortgaged property to sale.

The facts are as follows: On the 29th of November 1882, Herembo Chunder Holdar, one of the defendants, mortgaged his one-third share of a house in Calcutta and a garden in the 24-Pergunnahs to the plaintiff to secure Rs. 1,000 and interest at 12 per cent.

On the 3rd of January 1884, Herembo Chunder Holdar mortgaged his one-third share of the Calcutta house to the defendant Bindobashinee Dossee to secure Rs. 1,000, with interest at 18 per cent.

On the 14th of May 1884 the defendants, Herembo Chunder Holdar, Surut Chunder Holdar, and Benayak Chunder Holdar, mortgaged the whole sixteen annas of the two properties, included in the mortgage of the 29th November 1882, to the plaintiff, to secure Rs. 3,400 and interest at 18 per cent.

This last mortgage recites the mortgage of the 29th November 1882, and a further loan by the plaintiff to Herembo Chunder Holdar of Rs. 100, and proceeds, "Now in order to liquidate the said debt, and on account of other necessities of ours, we three brothers do this day mortgage to you whatever right, title and interest we three brothers have in the said two properties and take the loan of Rs. 3,400; out of this money we have also liquidated the said debt, therefore, for interest of the said money, we will pay at the rate of 1-8 per mensem, and within 12 months from this day's date, we will repay the whole amount in full, principal as well as interest."

Upon these facts, Mr. Justice Trevelyan has dismissed the suit altogether, holding that by the transaction of May 24th, 1884, the debt of November 29th, 1882, was paid off, and the security created by the deed of that date satisfied and cancelled. It has been argued before us that, looking at the real nature of the transaction, it did not amount to payment of the original debt, but was in fact a further advance and a fresh security, and that even if the effect of the transaction was that the original debt was paid, that did not necessarily destroy the security, the real

test being what must the plaintiff be presumed to have intended to do under the circumstances if he had known all the facts.

It was also contended that if the defendants' contention was correct, the suit should not have been dismissed, as the plaintiff must be entitled, in any case, to some relief in the suit. In our opinion, all these arguments are valid and must be given effect to, and we are unable to agree with Mr. Justice Trevelyan in the conclusion at which he has arrived.

Looking at the construction of the deed of May 1884, we do not think the transaction amounted to payment of the original debt; but looking at what was done in fact, and not to mere words, we think that it was in reality a fresh advance upon fresh security being given for both the old debt and the fresh advance, and upon a fresh arrangement being made as to interest, but that the old security for the old debt remained untouched. Even if this were not so, and the old debt was paid by the new transaction, the cases of *Phillips* v. *Gutteridge* (1), *Adams* v. *Angell* (2), *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (3), and *Goluck Nath Misser* v. *Lalla Prem Lal* (4) show that that would not necessarily destroy the security; but that if there was nothing to show a contrary intention, the creditor must be presumed to have intended to keep the security alive for his own protection. We can see nothing in this case to indicate a contrary intention on his part, and we think that the plaintiff here must be presumed to have had such an intention, and that in either view the security of November 29th, 1882, is still subsisting, and the plaintiff is entitled to a declaration that notwithstanding what has taken place, his mortgage of November 29th, 1882, has priority over that of January 3rd, 1884, in favour of the defendant Bindobashinee Dossee.

An account will be taken of what is due for principal and interest under the mortgage of November 29th, 1882, and of what is due for principal and interest under the mortgage of May 14th, 1884, and it will be declared that the amount due under the first mortgage is a first charge upon the property mentioned in that mortgage, and that the amount due on the mortgage

(1) 3 De G. and J., 531.
(2) L. R., 5 Ch. D., 634.
(3) I. L. R., 10 Calc., 1035.
(4) I. L. R., 3 Calc., 307.

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of May the 14th, 1884, is a charge upon the whole of the property mentioned in that mortgage, subject to a charge in favour of the defendant Bindobashinee Dossee for the amount due for principal and interest under her mortgage upon Herembo Chunder Holdar's one-third share of the house in Calcutta, and that the plaintiff do sell the properties not included in such last mentioned mortgage first.

In taking the accounts as between the mortgagors and the mortgagee, the amount found to be due under the mortgage of November 29th, 1882, minus the interest from November 29th, 1882, and May 14th, 1884, must be deducted from the amount found to be due under the mortgage of that date in order to arrive at the sum now due from the mortgagors, the Holdars, to the plaintiff, and for which he is entitled to bring the mortgaged properties to sale.

The plaintiff will be entitled to add his costs to his mortgage and, under the circumstances of the case, the costs of the defendant, Bindobashinee Dossee, should also be added to her mortgage.

Appeal allowed.

Attorney for the appellant: Baboo *N. C. Bural.*

Attorney for the respondents: Mr. *C. N. Manuel.*

T. A. P.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice Tottenham.

1889 *March* 21.

JOGGOBUNDHU MITTER (PLAINTIFF) *v.* PURNANUND GOSSAMI AND ANOTHER (DEFENDANTS).*

Limitation Act (XV of 1877), Sch. ii, art. 142—Symbolical possession.

On the 7th November 1868, certain property was purchased by one Gopal Dass Banerjee at a sale held in execution of a decree obtained against one Jogodanund Gossami. On the 8th January 1873, the purchaser obtained a

* Full Bench on Appellate Decree, No. 2321 of 1887, against the decree of H. Mathews, Esq., Officiating District Judge of Nuddea, dated 5th August 1887, reversing the decree of Babu Nuffer Chunder Bhutto, Subordinate Judge of that district, dated the 22nd September 1886.

sale certificate, and, on the 10th August 1873, was put into symbolical possession of the property through the Court.

On the 3rd March 1875 the plaintiff, in execution of a decree obtained against Gopal Das Banerjee, purchased this property, symbolical possession of the property being given to him by the Court on the 31st March 1875.

On the 7th August 1885, the plaintiff brought this suit to recover possession of this property, alleging that he had been dispossessed therefrom on the 13th July 1885 by the defendant No. 2, who had taken an izara of the property from the son of Jogodanund. The defence set up was limitation.

Held, that on the principle laid down in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1) the suit was not barred.

Krishna Lal Dutt v. *Radha Krishna Surkhel* (2) overruled.

THIS was a reference to a Full Bench made by Petheram, C.J., and Trevelyan, J., on the 9th March 1889; the referring order was as follows:—

"The land in dispute originally belonged to one Jogodanund Gossami. In execution of a decree against him, it was sold on the 7th November 1868 to one Gopal Das Banerjee. Gopal Das Banerjee obtained a sale certificate on the 8th January 1873, and, on the 10th August of the same year, obtained, through the Court, what is called symbolical possession, that is, delivery was made in accordance with s. 319 of the Civil Procedure Code. The land was then, and has since been, in the possession of tenants. Neither Gopal Das nor the plaintiff have obtained possession of the property in any other way. On the 3rd March 1875, the plaintiff purchased this property at a sale held in execution of a decree obtained against Gopal Das, and, on the 31st March 1875, obtained symbolical possession.

"This suit is brought on the 7th August 1885, against Purnanund Gossami, the son of Jogodanund, who has died, and a person who has taken an izara from Purnanund.

"The Lower Appellate Court, relying on the authority of the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (2), has held that the suit is barred by limitation under the provisions of article 138 of the second schedule of the Limitation Act, and has not considered the other questions in the case.

(1) I. L. R., 5 Calc., 584.
(2) I. L. R., 10 Calc., 402.

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"As we have doubts as to the correctness of the decision in the above cited case, we refer to the Full Bench the question whether the suit is barred?

"The following cases were also cited to us: "*Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1), *Lokessur Koer* v. *Purgun Roy* (2), *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3), and *Uma Shankar* v. *Kalka Prasad* (4)."

Babu *Mohesh Chunder Chowdhry*, for the appellant, contended that the suit was not barred, referring to *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1), *Lokessur Koer* v. *Purgun Roy* (2), and *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3).

Babu *Hem Chunder Banerjee*, for the respondents, contended that neither the plaintiff nor his predecessor in title had ever enjoyed possession of the property, and therefore the suit was barred; that the symbolical possession given to Gopal Das and the plaintiff would not disturb the possession of Jogodanund; and referred to *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (5) and *Uma Shanker* v. *Kalka Prasad* (4).

The opinion of the Court (PETHERAM C.J., MITTER, J., PRINSEP, J., WILSON, J., and TOTTENHAM, J.) was as follows:—

The question referred to the Full Bench is stated in these words: "Is this suit barred by limitation?" And the reason for the reference is that the learned Judges doubt the correctness of the case of *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (5), followed by the Lower Appellate Court in the present case.

The suit was brought to recover possession of a 4-annas' share of Mouzah Mukannagur, upon the allegation that the defendant No. 2 had dispossessed the plaintiff on the 31st of Assar 1292 (which was some day in July 1885); and the suit was instituted on the 7th of August following. The plaintiff's case was that he had purchased the property at auction in execution of his own decree against one Gopal Das Banerjee on the 3rd of March 1875; that he had obtained possession through the Court, and had enjoyed possession by the receipt of rent until disturbed and ultimately ousted by the defendant No. 2.

(1) I. L. R., 5 Calc., 584.
(2) I. L. R., 7 Calc., 418.
(3) I. L. R., 11 Calc., 93.
(4) I. L. R., 6 All., 75.
(5) I. L. R., 10 Calc., 402.

Gopal Das Banerjee had, it was alleged, acquired the property by purchase at auction in execution of a decree against Jogodanund Gossami on the 8th of January 1873, and had obtained possession through the Court on the 10th of August of that year.

Among the pleas raised by the defendants was that of limitation; for it was contended that the plaintiff, who had purchased the property in 1875, had never enjoyed any possession of it; and that his predecessor in title, Gopal Das Banerjee, had likewise failed to obtain any real possession. The defendants are two in number, the first being the son of the Jogodanund Gossami, whose interest in the property was sold in execution of a decree in 1868; and the second being a person claiming possession as *izaradar* under him.

On the point of limitation the defendants' case is that the possession of Gossami was never disturbed by the execution proceedings either against Jogodanund, or against Gopal Das Banerjee. The Courts below have negatived the plaintiff's allegation that he ever had *substantial* possession of the property.

The question, therefore, whether the present suit is barred by limitation or not depends upon the legal effect to be given to the *symbolical* possession, as it is called, obtained on the 10th of August 1873 by Gopal Das Banerjee as against the father of defendant No. 1. For this suit was instituted within 12 years of that date.

The symbolical possession, obtained by the plaintiff in 1875, would not affect the defendants who were not parties to the execution proceedings against Gopal Das Banerjee.

We are of opinion that the rule laid down in the Full Bench case of *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (1), is applicable to this case, and that its application saves the suit from the bar of limitation. That was a suit in which the assignee of a decree for possession of certain immoveable property had been put in formal possession by process of execution under s. 224 of Act VIII of 1859, and had then sold his interest to the plaintiffs, who had since been unable to obtain possession, and sued to recover it from the original defendant. The Full Bench held that the symbolical possession obtained by the plaintiffs' vendor was effective as against the judgment-debtor defendant, and that

(1) I. L. R., 5 Calc., 581.

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the suit brought against him within 12 years of that event was not barred by limitation.

In the present case the Court of first instance held,—and we think rightly held,—that the principle there laid down as to symbolical possession obtained by the decree-holder under his decree, is equally applicable to the case of a purchaser at auction in execution of a decree. It is the only mode in which the Court can give the purchaser possession, and as against the judgment-debtor it is effective for all purposes.

The case noticed by the Division Bench which referred this question to the Full Bench, *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (1), was decided without reference to the earlier Full Bench case which was apparently not brought to the notice of the Judges.

By applying the principle laid down by the Full Bench in *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (2), we find that the judgment-debtor was actually in possession on the 10th August 1873, and was entitled to be in possession again from that or any subsequent date when he was dispossessed by the previous owner.

The present suit having been instituted within 12 years of the 10th of August 1873, our answer to this reference must be that the suit is not barred by limitation.

The result is that the decree of the Lower Appellate Court must be set aside and the case must go back to be determined on the merits.

T. A. P.

(1) I. L. R., 10 Calc., 402. (2) I. L. R., 5 Calc., 584.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

BAIJNATH SAHAI (PETITIONER) *v.* MOHEEP NARAIN SINGH AND OTHERS (OBJECTORS).* 1889 *March* 28.

Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 293—Question for Court executing decree—Defaulting purchaser answering for loss by resale—Description of property at sale and re-sale, Difference of—Regular suit.

An appeal will lie against an order made under s. 293 of the Code of Civil Procedure—*Sree Narain Mitter* v. *Mahtab Chund* (1), *Sooruj Buksh Singh* v. *Sree Kishen Doss* (2), *Joobraj Singh* v. *Gour Buksh* (3), *Bisolcha Moyee Chowdhrain* v. *Sonatum Doss* (4), *Ram Dial* v. *Ram Das* (5), followed.

The sale contemplated by s. 293 of that Code must be a sale of the same property that was first sold and under the same description, and any substantial difference of description at the sale and re-sale, in any of the matters required to be specified by s. 287, to enable intending purchasers to judge of the value of the property, will disentitle the decree-holder to recover the deficiency of price under s. 293.

Semble :—That even if the difference of description was due to the value of the property having been changed, between the sale and re-sale, owing to causes beyond the control of any person, the decree-holder, if entitled to claim damages against a defaulting purchaser at the first sale, must proceed against him by way of suit and not by an application under s. 293.

THIS was an appeal by a decree-holder against an order rejecting an application made by him under s. 293 of the Code of Civil Procedure, for the recovery from a defaulting purchaser, the respondent, of a certain sum of money as deficiency of price on a re-sale of certain properties sold in execution. The circumstances under which that application was made were as follows: Originally eleven properties had been advertised for sale, but as the price bid for five of them was sufficient to satisfy the decree, the remaining six were not put up for sale. The purchaser paid

* Appeal from Order, No 365 of 1888, against the order of Baboo Dwarka Nath Mitter, Subordinate Judge of Shahabad, dated the 2nd June 1888.

(1) 3 W. R., 3.
(2) 6 W. R., Mis., 126.
(3) 7 W. R., 110.
(4) 16 W. R., 14.
(5) I. L. R., 1 All., 181.

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twenty-five per cent. of the price as required by law, but made default in paying the balance, and a re-sale was thereupon ordered. At the first sale no encumbrance, upon the properties sold, was notified. But before the re-sale, the decree-holder put in a petition asking the Court to notify to intending purchasers two encumbrances upon the said properties, one in favour of a third party under a mortgage bond, and the other in favour of the decree-holder himself under a security bond, by which the said properties were charged as security for arrears of rent of a certain tenure. Both these bonds were of dates long anterior to the date of the first sale, and the encumbrance under the former was fully subsisting at that date. As regards the latter, the amount of the encumbrance notified had not fully accrued due until about a month after the date of the first sale, but in the absence of evidence to show that the rent which constituted the charge was payable only at the end of the year, it may, under s. 53 of the Bengal Tenancy Act, be presumed that it was payable by four instalments, and that three of these had accrued due before the former sale. The two encumbrances were notified at the re-sale, and the price bid for the first five properties was considerably below what they fetched on the former occasion. The other six properties were then sold, and the decree-holder sought to recover from the defaulting purchaser the deficiency in the price of the five properties re-sold diminished by the amount realized by the sale of the other six.

The Nazir who held the sale did not certify the deficiency of price to the Court as required by s. 293. The Subordinate Judge of Shahabad, before whom the application under s. 239 came on for hearing, dismissed the application, holding that there was nothing in s. 293 which directed a Court to enter into these questions summarily, and that they ought to form the subject of enquiry in a regular suit; he also held that it was unnecessary for the Nazir to give the certificate required by law unless 'the properties sold on the last occasion were, according to description, the same as were sold on the first.'

The decree-holder appealed to the High Court, urging that the lower Court had jurisdiction to go into the question of the correctness of the Nazir's report, and that the property being the

same, and the second purchaser not being the appellant, the lower Court should have passed an order in his favour leaving the respondent to contest the matter in a regular suit. On the other hand, the defaulting purchaser, the respondent, contended —*firstly*, that there was no appeal against the order of the Court below; *secondly*, that by reason of the difference in the descriptions of the property at the two sales, the second sale could not be regarded as a re-sale within the meaning of s. 293 of the Code of Civil Procedure; *thirdly*, that the Nazir who held the sale, having refused to certify the deficiency of price, the decree-holder could not recover anything; and, *fourthly*, that the decree-holder, having proceeded against other properties of the judgment-debtor, was not entitled to proceed under s. 293.

Moulvie *Mahomed Yusuf* for the appellant.

Mr. *C. Gregory* for the respondent.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) (after stating the facts) proceeded as follows:—

The first point should, we think, be decided in favour of the appellant. Section 293 of the Code of Civil Procedure enacts, amongst other things, that the deficiency of price happening on a re-sale shall be recoverable by the decree-holder from the defaulting purchaser under the rules contained in Chapter XIX for the execution of a decree for money. Questions like the one disposed of by the Court below in this case, must, therefore, be taken to be of the nature of questions arising between the decree-holder and the judgment-debtor relating to the execution of decrees, such as are contemplated by clause (*c*) of s. 244.— And as an appeal is allowed from the decision of any of these questions, there is no reason why an appeal should not lie against the decision of the Court below in this case. This view is in accordance with the decisions of this Court in the cases of *Sree Narain Mitter* v. *Mahtab Chund* (1), *Sooruj Buksh Singh* v. *Sree Kishen Doss* (2) *Joobraj Singh* v. *Gour Buksh* (3), *Bisokha Moyee Chowdhrain* v. *Sonatun Doss* (4), and with the Full Bench ruling of the Allahabad High Court in the case of

(1) 3 W. R., 3.
(2) 6 W. R., Mis., 126.
(3) 7 W. R., 110.
(4) 15 W. R., 14.

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Ram Dial v. *Ram Das* (1), with reference to the corresponding provisions of Acts VIII of 1859 and XXIII of 1861. It is true that the point has been considered open to doubt in two later cases,—*Huree Ram* v. *Hur Pershad Singh* (2) and *Ramdhani Sahai* v. *Rajram Kooer* (3); but in both these cases the appeal was heard and dismissed upon other grounds: and we see no reason to dissent from the earlier rulings by which an appeal is expressly allowed.

The second contention raised by the respondent is, however, in our opinion, perfectly valid, and this appeal must, therefore, fail. We think the re-sale contemplated by s. 293 of the Code of Civil Procedure must be a sale of the same property that was first sold, and under the same description, and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by s. 287 to enable intending purchasers to judge of the value of the property, should disentitle the decree-holder to recover the deficiency of price under s. 293. No doubt it is quite possible that, between the two sales, the value of the property may be changed by causes such as diluvion and the like, which are beyond the control of anybody; and, in such cases, it might fairly be urged that the decree-holder should not suffer for the purchaser's default. But in the first place that is not the case here. In this case the two encumbrances notified at the re-sale were in existance, either wholly or partially, at the time of the first sale; and one of them must have been known to the decree-holder since it was in his favour; and the other he was bound to enquire into, as the rules made by this Court under s. 287 of the Civil Procedure Code throw upon him the duty of ascertaining and notifying to the Court the encumbrances upon any property advertised for sale in execution of decree. In the second place, even if the difference of description were due to any such cause as is above refered to, although the decree-holder may, under certain circumstances, be entitled to recover damages from the defaulter, that must be by a regular suit and not by an application under s. 293. A claim to recover the deficiency of price

(1) I. L. R., 1 All., 181. (2) 20 W. R., 397.
(3) I. L. R., 7 Calc., 337.

by way of compensation would involve inquiry into difficult questions which must be decided before the proper amount of damages could be ascertained; and, the Legislature by leaving it to the officer holding the sale (who is generally a ministerial officer) to certify to the Court the amount that is to be recovered under s. 293, has sufficiently indicated that cases involving questions like these were never intended to be covered by that section, and that the only cases to which that section was intended to apply, are cases where the same property is sold under the same description at both the two sales. In the present case, after the decree-holder has succeeded in misleading the defaulting purchaser to bid a high price, by withholding information as to encumbrances which it was his duty to notify, if he were allowed to recover the deficiency of price at the re-sale, it would be allowing him to take advantage of his own neglect of duty. That would be so manifestly inequitable that we are unable to hold that the Legislature could have ever intended such a result.

As the appeal fails upon this ground, it is unnecessary to say anything upon the other two points raised by the respondent.

As regards one of the five properties (it is one of very small value), it was urged that the encumbrances were not notified at the re-sale, just as they had not been notified at the first sale, and that the appellant was consequently entitled to succeed in regard to that property in any case. But the decree-holder's petition, before the re-sale, stated that that was subject to the same encumbrance as the other four, and so, practically, there was no difference between the case of that property and that of the other four.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

April 5. 1889

BUNSEEDHUR (DEFENDANT) *v.* SUJAAT ALI AND ANOTHER (PLAINTIFFS).°

Decree—Form of decree—Construction of Mortgage bond—Liability of property other than that Mortgaged.

Under a mortgage bond, a mortgagor stipulated that, if the money advanced should not be repaid at a fixed date, the mortgaged property might be sold; and that, if the property were sold for arrears of Government revenue or for other causes, the mortgagee might, in such cases, recover the money advanced by execution against the person or other property of the mortgagor.

Held, no sale having taken place under the second stipulation, that the mortgagee could only obtain a decree against the mortgaged properties.

Narotam Dass v. *Sheopargash Singh* (1) referred to.

SUIT to recover Rs. 7,346, as principal and interest on an ordinary mortgage bond.

So far as is necessary for the purposes of this report, the facts are as follows:—

The plaintiff sued on a mortgage bond, dated the 6th January 1880, to recover the above-mentioned sum, asking for sale of the properties, the subject of the mortgage, and, if they should be insufficient to meet the amount due, for a decree against the person and other properties of the mortgagor. The mortgage was admitted, the only contention necessary to mention, raised by the defendant, the mortgagor, being, that the plaintiff was not entitled, under the terms of the mortgage, to obtain a decree against the person and other properties of the mortgagor.

The mortgage bond, after reciting that certain sums were due and owing to certain persons, and that the mortgagee had borrowed a certain sum from the mortgagor for the purpose of meeting these liabilities, stated that the mortgagor promised to pay and liquidate the principal amount so borrowed in the month of Jeyt 1291 F. S., and interest amounting to Rs. 45 per month in the month of Assin, year by year; that if such

° Appeal from Original Decree, No. 59 of 1888, against the decree of Babu Grish Chunder Chowdhry, Subordinate Judge of Patna, dated the 12th December 1887.

(1) I. L. R., 10 Calc., 740.

interest was not paid then, the mortgagee should be at liberty to recover the same by suit; that until repayment of such principal and interest, the mortgagor pledged and mortgaged certain properties; that if ever the mortgaged property should be sold by auction for arrears of Government revenue or any other reason, then the mortgagees, their heirs or representatives might recover the loan, principal and interest, in any manner they might consider feasible, either from the person or other moveable or immoveable property of the mortgagor; and that if the principal was not paid by Jeyt 1291 F. S., then the mortgagee might institute a suit to recover from the mortgaged property.

The Subordinate Judge (after stating that it was contended before him that, inasmuch as the bond did not contain any stipulation for the recovery of the money from the person and mortgaged properties of the mortgagor, except in the case of an auction sale of the mortgaged properties, and provided for its recovery in other cases from the mortgaged property, therefore, the plaintiffs have no right to recover the money from the person or other properties of the mortgagor, save as above mentioned) was of opinion that the plaintiff had a right to recover either from the mortgaged properties, the person of the mortgagor, or his other properties; and that if the parties had intended such a state of things as contended for by the mortgagor, the mortgage bond would have contained a proviso to that effect; but, no such proviso being in existence, he gave the plaintiff a money decree for the principal and interest due, to be paid within six months, and, in default of such payment, for sale of the mortgaged properties, and, on their proving to be insufficient, the plaintiff to be at liberty to recover the balance from the person and other properties of the mortgagor.

The defendant appealed to the High Court on, amongst other grounds, the ground that the plaintiff was not entitled to a decree against the person or other properties of the mortgagor save in the event of the unmortgaged property being sold as in the bond provided for.

Mr. *Das*, Moulvi *Mahomed Yusuf* and Babu *Durga Mohun Das* for the appellant.

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BUNSEE-DHUR v. SUJAAT ALI.

Mr. *Amir Ali* and Moulvi *Serajul Islam* for the respondents.

Mr. *Das*, on the question of the mortgagor's right to a personal decree, referred to *Narotam Dass* v. *Sheopargash Singh* (1).

Mr. *Amir Ali* (on this point) contended that it was a vicious principle to attempt to construe one document by another which was not before the Court and which was not even fully set forth in the report. The personal liability of the borrower arose from the transaction independently of the loan which was created by the contract. Unless it distinctly appeared that the mortgagor had abandoned the right to proceed against the person, the Court should not take away that right.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by

TOTTENHAM, J.—This is an appeal against a decree made by the lower Court upon a mortgage bond. The decree is made in favour of the plaintiff for the sum claimed, with costs and interest. The decree provides that should the defendant No. 1 fail to pay up the amount of the decree within six months from the date thereof, the mortgaged properties shall be sold; and if they be insufficient to satisfy the decree, then the plaintiffs shall be at liberty to recover the balance from the person or other property of the defendant No. 1.

The defendant No. 1 has appealed against this decree upon various grounds. There is no dispute as to the execution of the bond, but it is contended, on his behalf, that the Court was wrong in making the debtor or his other property liable for the debt; for it is contended that the mortgage bond itself limits the plaintiffs' means of relief to the mortgaged property, excepting in the event of the mortgaged property having been sold by auction on account of arrears of Government revenue or for any other reason.

The main point in this appeal is, that the lower Court has misconstrued the mortgage bond and has wrongly made the defendant personally liable for the amount as well as other property not covered by the mortgage.

(1) I. L. R., 10 Calc., 740.

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We have given our best attention to the document and the arguments advanced on both sides by learned counsel. The lower Court, while admitting that certain clauses of the deed do support the contention of the defendant, was on the whole of opinion that the intention of the parties was not in accordance with that contention. The Subordinate Judge says: "The bond in suit is an ordinary mortgage bond taken by creditors in this country to secure their money. It contains, as usual, a promise to re-pay and a hypothecation of property in the form of a security. The holder of such a bond has ordinarily the right to recover his money either from the mortgaged property or from the person or other properties of the mortgagor. That right, I think, is not taken away by covenant, which merely provides that the mortgagees will be at liberty to recover their money from the person and other properties of the mortgagor if the mortgaged properties are sold for arrears of revenue, and also to recover it from the mortgaged properties if the mortgagor fails to re-pay the money within the time fixed. These clauses do not lay down that, in the latter case, the mortgagee will not be at liberty to recover any portion of the money from the person and unmortgaged properties of the mortgagor even if the mortgaged properties be insufficient. The bond does not make any provision for such a contingency."

Our attention has also been drawn to s. 90 of the Transfer of Property Act, which provides that, in the event of the sale of the mortgaged property not satisfying the decree given upon the bond, a decree may issue against the person and other property of the debtor. We think, however, that the case brought to our notice, *Narotam Dass* v. *Sheopargash Singh* (1) being a judgment of the Judicial Committee of the Privy Council, in a case, which, as reported, seems extremely similar to this, compels us to take a view different from that of the lower Court. In that case a Taluqdar in Oudh had executed a deed by which he hypothecated his taluq as security for a debt of Rs. 4,103. The deed also contained a promise that he would re-pay the principal with interest within a term of two years. The Privy Council held that this was a mortgage of the

(1) I. L. R., 10 Calc., 740.

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estate and nothing else; that there was no personal contract on the part of the debtor to pay the debt out of his personal estate; that it was a mere contract to pay out of the hypothecated estate, and as the hypothecation for other reasons was invalid the plaintiff's suit was dismissed. In the present case, the bond contains very much the same provisions as in that case; but, if anything, its wording is more strongly in favour of the debtor than it was in that case. Here also we have the promise of the debtor to re-pay and liquidate the principal amount in full in one lump sum in Jeyt 1291, together with interest to be paid in a lump in each year. If a similar clause in the bond given by Sheopargash Singh in the case cited did not amount to a contract to pay out of his personal estate, we hardly see how it can be held to amount to such a contract in this case. Here, however, there is something more in favour of the judgment-debtor's contention; provision is made that if the mortaged property is sold by auction for arrears of Government revenue, or for any other reason, then it shall be competent to the creditors or their heirs to recover the loan, principal and interest, in any manner that may be considered feasible; either from the person or from the moveable and immoveable property of the debtor; and the last clause of the bond provides that if, according to agreement, the principal cannot be re-paid in 1291 F, then it shall be competent to the Maharajah to recover, by suit, from the mortgaged property, but it is quite silent as to any further relief.

Therefore upon the clauses of the bond and upon consideration of the decision of the Privy Council in the case mentioned, we are of opinion that we must hold that the defendant is not liable in his person and other property to satisfy the decree on the bond.

The result is that the decree of the lower Court will be modified to this extent, that while we maintain the amount of that decree, the means of satisfying it must be limited to the sale of the mortgaged properties.

Decree varied.

T. A. P.

CIVIL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

MAHABEER SING (PLAINTIFF) *v.* RAMBHAJJAN SAH AND OTHERS (DEFENDANTS).* 1889 *March* 29.

Civil Procedure Code (Act XIV of 1882), ss. 13, 43—Res judicata—Cause of action—Damages.

In September 1886 the plaintiff sued in a Munsiff's Court certain defendants for possession of one biggah of land, and for damages for the cutting and carrying of certain paddy from such land on the 23rd December 1885. This suit was dismissed on the ground that no dispossession had taken place, the plaintiff being referred to a Small Cause Court for his damages. No appeal was made against this decision.

In March 1887 the plaintiff sued these defendants in the Munsiff's Court for possession of 5 biggahs 6 cottahs of land and for mesne profits, and obtained a decree for possession of 3 biggahs 6 cottahs of land with mesne profits; possession of the one biggah, the subject of the suit of 1886, being included in the 3 biggahs 6 cottahs decreed. He subsequently sued the same defendants in a Small Cause Court for damages for the paddy cut and carried on the 23rd December 1885: *Held*, that such suit was not barred by either s. 13 or s. 43 of the Civil Procedure Code.

REFERENCE from a Provincial Court of Small Causes.

This was a suit brought in the Small Cause Court of Chupra to recover Rs. 46 and interest for the price of certain paddy and straw which the defendants on the 23rd December 1885 forcibly cut and took from off one biggah out of 3 biggahs 16 cottahs of land held by the plaintiff.

The plaintiff alleged in the plaint that he had brought, on the 7th September 1886, a suit No. 50 of 1886, against these same defendants in the Munsiff's Court, for possession of this one biggah of land on which the said paddy had been grown, and for the price of the paddy which had been forcibly carried away; but that such suit had been dismissed by the Munsiff, who held that the taking of the paddy did not amount to an act of dispossession, and that as to the price of the paddy the plaintiff should have brought his suit in a Court of Small Causes.

* Civil Reference No. 1A of 1889, made by Baboo Menu Lal Chatterjee, Judge of the Court of Small Causes, Chupra, dated the 13th of February 1889.

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No appeal was filed against this judgment. He further alleged that, in August 1886, after that decision, the defendants had dispossessed him from 5 biggahs 1 cottah of land, and that he had brought, on the 21st March 1887, a suit No. 26 of 1887 against them for possession and mesne profits, and had obtained a modified decree for possession of 3 biggahs 16 cottahs only, with mesne profits, of which lands the one biggah referred to above formed part.

The defendants contended the suit was barred by ss. 13 and 43 of the Civil Procedure Code.

The Judge of the Small Cause Court held that, if the Munsiff had jurisdiction to take cognizance of the suit for recovery of possession, he could have dealt with the claim for the price of the paddy, and that the plaintiff having allowed the Munsiff's judgment to pass unappealed, it was final; that the plaintiff having brought suit No. 26 of 1887 for possession and mesne profits with partial success, had waived his claim for the price of the paddy, said to have been taken on the 23rd December 1885, because at the time of bringing his suit for possession on the 7th September 1886, his cause of action for forcible deprivation of the paddy had already arisen on the 23rd December 1885; and that the terms "mesne profits" and "value of produce cut and carried away" were controvertible and in reality meant the same thing: he therefore held that the suit was barred both by ss. 13 and 43 of the Civil Procedure Code, but, on the request of the plaintiff, made his judgment contingent on the opinion of the High Court as to whether the suit was barred by either s. 13 or s. 43 of the Code.

No one appeared for the plaintiff.

Babu *Kali Kristo Sen* for the defendants.

The opinion of the Court (TOTTENHAM and BANERJEE, JJ.,) was delivered by

TOTTENHAM, J.—The question referred to us by the Judge of the Small Cause Court of Chupra is, whether or not that Court was right in deciding that the suit before it was barred by s. 13 and by s. 43 of the Code of Civil Procedure?

The suit was brought to recover damages in respect of the crop cut by the defendants and carried away from the plaintiff's

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land in the month of December 1885. It seems that the plaintiff, in 1886, brought a suit in the Munsiff's Court to recover from the defendants possession of the land of which the crop had been cut and also for the value of the crop. The Munsiff held that there had, in fact, been no dispossession, and that the act of cutting the plaintiff's crop and carrying it away did not disturb him in his possession of the land. He, therefore, dismissed the suit and referred the plaintiff to the Small Cause Court for recovery of the damage which he had sustained. Subsequently, in the month of August 1886, the plaintiff was actually dispossessed of the land in question, together with some larger area; and, in 1887, he brought a suit against the defendants, being the same parties as he had sued before, to recover from them possession of the land of which they had dispossessed him in August 1886, together with mesne profits. In that suit he obtained a decree as respects part of the land in that suit with mesne profits. The present suit was brought, in the Small Cause Court of Chupra, to recover the damages alleged to have been sustained in December 1885.

The Judge of the Small Cause Court was of opinion that the suit was barred as *res judicata* by s. 13, and also barred by s. 43 of the Code of Civil Procedure. He thought that it was barred as *res judicata* by s. 13, because the plaintiff had made no appeal against the Munsiff's decision in 1886 by which his suit for possession and for the value of the crops was dismissed. He considered therefore, that the plaintiff had allowed the Munsiff's decision to become final and that it finally disposed of the present question. And as regards s. 43, he thought that that section barred the suit, because the plaintiff, when he sued for possession on a subsequent cause of action accruing in August 1886, did not include, in his claim for mesne profits, the damages which had accrued in December 1885. The Small Cause Court Judge, therefore, dismissed the suit contingently upon the opinion of this Court on the question referred under s. 617 of the Code.

The plaintiff is not represented before us. Baboo Kali Kisto Sen has appeared for the defendants in support of the view of the Judge of the Small Cause Court, but he has not been able to show us any reason why s. 43 should apply to this case. It appears to us clear that that section has been erroneously applied to

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it. We fail to see how the plaintiff could have included in a claim for mesne profits arising out of an act of dispossession committed against him in August 1886, a demand for compensation in respect of damage said to have been done to him when he was still in possession of the land in December 1885. "Mesne profits" are defined in s. 211 of the Code of Civil Procedure, to be those profits which the person in wrongful possession of property actually received or might with ordinary diligence have received therefrom, together with interest on such mesne profits. Mesne profits, therefore, could only be recovered from the date of dispossession, and not in respect of any period anterior to dispossession. Section 43 provides that every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action. The cause of action in the present suit was a totally different one from that in the suit of 1887. The cause of action in this case accrued in December 1885, whereas the cause of action in the other suit accrued in August 1886. Section 43, therefore, does not in our opinion bar the suit. Nor, we think, does s. 13. As regards the present claim the Munsiff did not deal with it. He thought he had no jurisdiction to deal with it being merely a claim for damages. If there was no dispossession of the plaintiff, we think that the Munsiff was right in so finding, and in declining to go into the other question. Up to this time there has been no adjudication of the plaintiff's claim for damages in respect of the crop cut in December 1885. We do not think the plaintiff was bound to appeal against what was obviously a proper decision; and that decision did not touch his present claim. That being so we think that our answer to this reference must be that in our opinion the Judge of the Small Cause Court was wrong in dismissing the suit upon the grounds stated. As the plaintiff has not appeared there will be no costs in this reference.

T. A. P.

Judgment for plaintiff.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

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April 2.

JITU LAL MAHTA (DEFENDANT) *v.* BINDA BIBI (PLAINTIFF).*

Succession Act (X of 1865), s. 96—Hindu Wills Act (XXI of 1870), ss. 2, 3—Lapsed Legacy—Lapse of gift to testator's lineal descendant—Probate and Administration Act (V of 1881), s. 131.

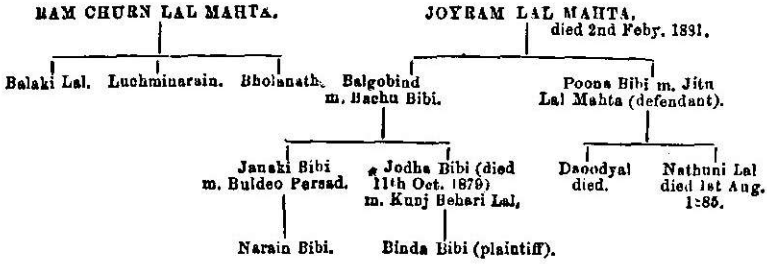
A testator, by his will dated the 22nd April 1878, gave a legacy of Rs. 5,000 to his son's daughter Jodha, to be paid to her out of a certain sum owing to the testator by the Rajah of Bettia.

The testator died on the 2nd February 1881, and Jodha in October 1879; the money due by the Rajah of Bettia was realized on the 7th December 1884. Jodha left an only child Binda, who was born before the death of the testator.

Binda sued to recover the legacy left to her mother; the defence was that the legacy had lapsed. *Held*, that Jodha was, in point of law, within the meaning of s. 96 of the Succession Act, a person in existence at the death of the testator, because a lineal descendant of her's survived the testator.

ONE Joyram Lal Mahta, by his last will and testament, dated the 22nd April 1878, gave his property to the two sons of his daughter Poona Bibi, subject to a bequest of Rs. 5,000 to Jodha Bibi, the second daughter of his deceased son, Balgobind Mahta. Jodha Bibi died in 1879, and the testator on the 2nd February 1881.

The following is a geneological tree of the families of Joyram Lal Mahta and his brother :—



* Appeal from Original Decree, No. 97 of 1888, against the decree of Baboo Grish Chunder Chatterjee, Subordinate Judge of Tirhoot, dated the 15th of February 1888.

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JITU LAL MAHTA v. BINDA BIBI.

The testator's will contained, amongst others, the following clause: "As a matter of favour, I made up my mind to give some cash to the following men and women; but at present being ill and short of money, I am unable to realize my desire, which I therefore express here, and strictly enjoin my daughter's sons that, upon realization of the principal and interest due to me from the Maharajah of Bettia under a bond, they should first liquidate the debts due from me, and then, after paying these debts, they should pay to the following persons the sums fixed by me for them as shown against their names :—

(1.) To Ram Churn Lal Mahta, elder brother, if he be living, and, if he be dead, to his sons and grandsons, on consideration of their being heirs of the said Ram Churn Lal Mahta ... Rs. 7,000.

(2.) To Bachu Bibi, widow of my son ... Rs. 6,000.

(3.) To Janaki Bibi, wife of Buldeo Persad, my eldest grand daughter ... Rs. 6,000.

(4.) To Jodha Bibi, my younger granddaughter and wife of Kunj Behari Lal ... Rs. 5,000.

The bond debt, referred to in the testator's will, was realized by Jitu Lall, in full, on the 7th December 1884.

Davodyal predeceased the testator; Binda Bibi being born previous to the 2nd February 1881.

Binda Bibi, not having been paid the sum of Rs. 5,000, which was expressed to have been given by the testator to her mother, through her guardian, Kunj Behari Pershad, on the 23rd November 1887, gave notice to Jitu Lal that, if the principal with interest were not paid within five days, she would bring a suit to recover the sum. No payment having been made on the expiration of the period mentioned, she brought, by her next friend, Kunj Behari Pershad, the present suit for recovery of Rs. 6,780 against Jitu Lal.

The defendant contended that the legacy had lapsed, Jodha Bibi having died before the testator.

The Subordinate Judge held that it was the intention of the testator to make an absolute gift of the sum of Rs. 5,000 to Jodha Bibi, and that the exception to the general rule, as to

lapsed legacies, laid down in s. 96 of the Succession Act, applied, and that, therefore, the plaintiff being a lineal descendant of the testator was entitled to recover. A decree was, therefore, given in favour of the plaintiff for the sum of Rs. 5,000 with interest at 6 per cent.

The defendant appealed to the High Court.

Mr. *Evans* (with him Baboo *Mohesh Chunder Chowdhry* and Baboo *Taruck Nath Palit*), for the appellant.

Mr. *Woodroffe* (with him Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee*), for the respondent.

Mr. *Evans*.—Even supposing s. 96 of the Indian Succession Act to apply to the case, it being clearly the intention of the testator, inferable from the entire will, that the legacy to Jodha Bibi should lapse in the event of her predeceasing him, the decree of the Judge was wrong; though s. 2 of the Hindu Wills Act makes s. 96 of the Succession Act applicable to the will of Hindus generally, yet, having regard to s. 3, s. 96 cannot operate so as to prevent a lapse of the legacy. If it did, it would be contrary to the rule laid down in the *Tagore case* (1)—See *Alangamonjori Dabee* v. *Sonamoni Dabee* (2). The effect of applying it would be to make it possible that a gift by will should take effect at the death of the testator in favour of a person not then in existence, and to enable the heir of the deceased donee or a creditor of the deceased donee to claim it as assets of the donee who was not in existence when the gift took effect.

According to the principle laid down in *Alangamonjori's case* (2) this cannot be done.

It cannot be contended that Binda Bibee, the daughter of the donee, takes direct. It is clear that the creditors (if any) of the donee would have a right to have the money applied as part of the original donee's estate, in preference to creditors of Binda, or that the Official Assignee of Jodha, the original donee (if she was insolvent), would get it. "Existence in contemplation of law," spoken of in the *Tagore case*, means existence in contemplation of Hindu Law, either special texts, or on general principles.

(1) 9 B. L. R., 377. (2) I. L. R., 8 Calc., 637.

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Having regard to s. 3, it is a *petitio principii* to contend that the donee was alive in the contemplation of the law as laid down in s. 96; for the question is whether s. 3 does not prevent s. 96 operating so as to enable a Hindu, who could not take apart from that section under the principles of Hindu Law, to take by virtue of it.

Mr. *Woodroffe* for the respondent.—As to the appellant's argument on the intention of the testator—such intention would have been invalid if s. 96 applies, there would have been no necessity for providing for the grand-daughter's descendants, but there would have been necessity for providing for the brother's descendants. The case of *Alangamonjori Dabee* v. *Sonamoni Dabee* (1) does not apply, it deals with the case of an unborn person, and decides that gifts to unborn persons, which are invalid under Hindu law, have not been made valid by s. 99 of the Succession Act. The question here is not as to such a person, but is as to a gift to a person who dies before delivery is given. Hindu law does not necessarily require the donee to be a sentient person, or rather it treats as sentient beings some who ordinarily would not be so treated; for it recognizes gifts to idols; *Kumara Asima Krishna Deb* v. *Kumara Krishna Deb* (2) and *Krishnaramani Dasi* v. *Ananda Krishna Bose* (3); the offering of pindas and water to the deceased proceeding upon the principle that the will of the donor, not the acceptance of the donee, is the cause of property (*Jimuta Vahana's Dayabhaga*, ch. 1, ss., 21, 22). Further it provides for the case of the completion of gifts either to one who is dead, but erroneously supposed to be living, or to one who is living, but dies before acceptance; *Colebrooke's Digest*, Bk. V. ch. I. s. 1: *Jaganatha's* (Madras Ed.) 190. A corporation is not a sentient being, but yet gifts may be made to a municipality. The rule in the *Tagore case* does not require the donee to be a sentient person; see *Jotindra Mohun Tagore* v. *Ganendra Mohun Tagore* (4) and *Jaganatha's Digest* (Madras Ed.), 191. There is here a statutory existence, as the person is in contemplation of law in existence by virtue of

(1) I. L. R., 8 Calc., 637.
(2) 2 B. L. R., O. C., 11 (47).
(3) 4 B. L. R., 231 (258).
(4) 9 B. L. R., 377 (400).

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s. 96, and in this way the uncompleted gift is called into effect in conformity with Hindu law.

The judgment of the Court (TOTTENHAM and BANERJEE, JJ.) was delivered by

BANERJEE, J.—The defendant is the appellant in this case. The facts are shortly these: One Joyram Lal Mahata executed a will on the 22nd April 1878, whereby amongst other things, he bequeathed a sum of Rs. 5,000 to his son's daughter, Jodha Bibi, to be paid to her out of a certain sum of money that was due to him from the Maharajah of Bettia. The testator died on the 2nd February 1881, and Jodha predeceased him, having died in October 1879. The plaintiff Binda Bibi, who is the daughter of Jodha Bibi, was, of course, born before the death of Joyram Lal; and the money out of which the legacy to Jodha Bibi was to be paid was realized from the Maharajah of Bettia on the 7th December 1884.

That being the state of things, the plaintiff, Binda Bibi, brought this suit to recover the sum of Rs. 5,000, with interest, upon the ground that she was the sole heir of Jodha Bibi.

The defence was that the bequest had failed by reason of Jodha Bibi having predeceased the testator.

The Court below overruled this objection, and gave the plaintiff a decree according to the provisions of s. 96 of the Indian Succession Act which applies to wills of Hindus, holding that as the bequest was in favour of a lineal descendant of the testator, and as that lineal descendant died leaving issue, the bequest did not lapse.

The defendant has appealed and the two objections urged on his behalf are, first, that even if s. 96 of the Indian Succession Act was applicable to this case, still, there being a clear intention in the will, inferable from other provisions in that document, that the legacy to Jodha Bibi should lapse in the event of her predeceasing the testator, the Court below was wrong in giving the plaintiff a decree; and, in the second place, that though s. 2 of the Hindu Wills Act makes s. 96 of the Succession Act applicable to wills of Hindus, generally, yet, having regard to the provisions of s. 3, it must

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be held that s. 96 cannot operate in favour of the plaintiff so as to prevent the lapsing of the legacy.

With regard to the former of these two contentions, we think there is nothing in it. The provision of the will to which reference was made, as indicating a contrary intention, is a bequest in favour of one Ram Churn Lal, the brother of the testator, that provision being to the effect that the legacy is bequeathed to Ram Churn Lal, and, in case of his death, to his sons and grandsons. It has been contended that as there is no similar provision in the case of the bequest to Jodha Bibi, we must take it that the bequest to Jodha Bibi was for her personal benefit alone. We do not think that any such inference follows. In construing this will, we must take it, that the testator knew the law that governed his case; and if, under that law, s. 96 of the Succession Act could prevent a lapse in the case of a bequest to a lineal descendant, it was not necessary for the testator to have made any provision in the case of the bequest to Jodha Bibi, such as he has made in the case of the bequest to Ram Churn Lal, in whose case there is not a similar rule for preventing the legacy from lapsing. Therefore, the question of a contrary intention, being inferable, depends upon the other question, *viz.*, whether s. 96 applies to this will.

This brings us then to the second contention raised by the learned counsel for the appellant. That contention is sought to be supported in this way. It is urged that the parties being Hindus, and it being a settled rule of Hindu law as laid down in the *Tagore case*, that none but a person in existence, either in fact or in the contemplation of law, can take a bequest under a will, to allow s. 96 to have operation in this case in enabling Jodha Bibi to take a bequest at a time when she was dead, would be in direct contravention of that rule. And, in support of this contention, the case of *Alangamonjori Dabee* v. *Sonamoni Dabee* (1) is referred to. That case no doubt puts a comprehensive meaning upon the language of the last clause of s. 3 of the Hindu Wills Act, and would apparently lend some support to the appellant's contention. But the facts of that case were not the same as the facts in the present case, and all we need,

(1) I. L. R., 8 Calc., 657.

therefore, say about that case is that it cannot be taken as governing the one now before us.

In the present case the mode in which the bequest to Jodha Bibi has been construed by the Court below and has to be construed under the provisions of s. 96 of the Indian Succession Act, is one that comes, in our opinion, within the rule in the *Tagore case* (1) which is laid down in these terms: 'A person capable of taking under a will, must, either in fact or in contemplation of law, be in existence at the death of the testator.' Now, Jodha Bibi was, in the contemplation of law as provided in s. 96, a person in existence at the time of the testator's death, because a lineal descendant of hers survived the testator. That being so, we do not think that by giving effect to this bequest, the rule in the *Tagore case* is in any way contravened.

It was urged that when that rule speaks of a person being in existence in the contemplation of law, the law referred to must be taken to be the Hindu law. We do not think that that is so, for in the judgment in the *Tagore case* we find that their Lordships, when speaking of a person in embryo as being a person in existence, referred to general principles of jurisprudence for coming to that conclusion and not to any specific rule of Hindu law.

We may also observe that the effect of our upholding this bequest is to make the legacy vest in Binda Bibi, a person who was in existence at the time of the testator's death, so that, in fact, the application of s. 96 does not lead to the creation of any estate which the testator could not have created under the Hindu law. We think, therefore, the judgment of the Court below upon this point ought to be upheld.

An objection was taken that the Court below was wrong in allowing interest upon the legacy; but we do not think that objection to be of any weight, having regard to the provisions of s. 131 of the Probate and Administration Act.

The result is that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

(1) 9 B. L. R., 377.

PRIVY COUNCIL.

P. C.* 1888 *November* 9 *and* 14, *and December* 1.

BHASBA RABIDAT SINGH (PLAINTIFF) *v.* INDAR KUNWAR AND OTHERS (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Estates' Act (I of 1869), *s.* 13, *sub-section* 1—*Meaning of "intestate" as there used—Written but unregistered authority to adopt—Registration Act (III of* 1877), *s.* 17—*Invalid agreement relating to the estate of the adopted son—Conditional adoption.*

The Oudh Estates' Act, 1869, requires the registration of the writing by which an authority to adopt is exercised; but not the registration of the authority, which is required by the Act to be in writing.

The Indian Registration Act III of 1877, which does require authorities to adopt to be registered, expressly excepts authorities conferred by will.

The word "intestate," in s. 13, sub-section 1, of the Oudh Estates' Act, 1869, means intestate as to the talukhdari estate; and the use of the word does not exclude from the exception in that sub-section a son adopted under an authority conferred by a talukhdar's unregistered will.

A talukhdar by his will authorized his senior widow to select and adopt a minor male child of his family to be the owner of the entire *riasat*. This power having been exercised, the following objections to the adoption were disallowed: 1*st*, one founded on the will not having been registered, and consequently, the authority not having been registered. 2*ndly*, one founded on the erroneous argument that the adopted son was not within the class excepted in s. 13, sub-section 1, and therefore could not take under an unregistered will.

The adoption was also questioned on the ground that the widow had agreed, with the natural father of the adopted son, that she should retain the whole estate during her life. *Held*, that this had not rendered the adoption conditional, and that it did not affect the rights of the adopted son. Even if it had amounted to a condition, the analogy, such as it was, presented by the equities relating to powers of appointment under English law, suggested that the condition itself would have been void, without invalidating the adoption.

APPEAL from a decree (27th March 1886) of the Judicial Commissioner, affirming a decree (19th May 1885) of the District Judge of Faizabad.

The suit out of which this appeal arose was brought to obtain a declaration of the plaintiff's title as heir to the talukhdari and

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, SIR R. COUCH AND MR. STEPHEN WOULLFE FLANAGAN.

other estate of the late Maharaja Sir Digbijai Singh, K. C. S. I., talukhdar of Bulrampur in Oudh, should the plaintiff survive the widows of the deceased; also, a declaration that the adoption by the late Maharaja's senior widow, the Maharani Indar Kunwar, the first defendant, whereby she had purported, under an authority from her husband in his will, to adopt Udit Narain Singh, a minor sued as under her guardianship, was invalid. The junior widow, the Maharani Jaipal Kunwar, was also made a party defendant.

The late Maharaja died on 27th May 1882, having made a will dated 15th March 1878. He left no issue; but conferred an authority to adopt upon the elder of his two widows. That he did so was decided in the appeal *Indar Kunwar* v. *Jaipal Kunwar* (1). To that suit the present plaintiff was not a party.

The will appears in the judgment of their Lordships on that appeal.

The relationship of the parties was as follows :—

BHAIYA FATEH SINGH.

Anup Singh.	Pahar Singh.
Kakolat Singh.	Tejan Singh.
Nawal Singh.	Bakht Bali Singh.
Arjun Singh.	(By adoption.) Rabidat Singh. (The plaintiff.)
Sir Digbijai Singh, K. C. S. I. (The last male talukhdar.)	

The elder widow adopted Udit Narain Singh on the 8th November 1883.

A deed of adoption, dated 15th December 1883, executed in the presence of witnesses, and reciting that she had, in accordance with the written permission of her deceased husband, adopted on Kahk Sudi, 8th Sambat 1940, corresponding to the 8th November 1883, Udit Narain Singh, minor son of Guman Singh, with due ceremonies, was registered on 5th December 1883.

At that time Guman Singh, the father, had signed an agreement in which, after stating that he gave his son to be adopted, he added :—

"The Maharani Sahiba shall have full control during her lifetime over him, and also over the property, moveable and immoveable, left by the

(1) L. R., 15 I. A., 127; I. L. R., 15 Calc., 725.

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Maharaja now in heaven, and she will be at liberty to punish him, and, if need be, to eject him and adopt in his place some one else from the family of the Maharaja Saheb."

This was dated the 26th October 1883. Afterwards, the Maharani executed and registered another document, dated 28th March 1884, in which she stated the adoption made, adding:

"I further state by this writing that I made this adoption on the express condition and understanding that the said will, executed in my favour, would subsist and remain in force, and that after my demise, or at the time of my death, the said Udit Narain Singh would succeed to the talukhdari estate, i.e., the immoveable property, which was formerly in the possession of my late husband, and which is now in my full proprietary possession."

After stating other particulars, the Maharani declared the deed, dated 5th December 1883, to be null and void, and this document, of 28th March 1884, to be "a *sanad*."

The District Judge upheld the adoption. He was of opinion that the document executed as his will by the late Maharaja operated, though unregistered, in favour of the Maharani, his widow, because she was one of the class of those persons contemplated in s. 22, Act 1 of 1869. He held to be untenable the argument that Udit Narain having been one of those persons who could not have come in under s. 13 sub-section 1, the document required registration within one month of its execution in order to operate in his favour, and not having been registered, could not be rendered available for authorizing his adoption (1).

(1) Section 13 of the Oudh Estates' Act I of 1869 enacts:—

"No talukhdar or grantee, and no heir or legatee of a talukhdar or grantee shall have power to give or bequeath his estate or any portion thereof, or any interest therein, to any person not being either (1) a person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such talukhdar or grantee, heir or legatee, had died intestate; or (2) a younger son of the talukhdar or grantee, heir or legatee, in case the name of such talukhdar or grantee appears in the third or the fifth of the lists mentioned in s. 8, except by an instrument of gift or a will executed and attested not less than three months before the death of the donor, or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution."

An appeal from this judgment was dismissed. The Judicial Commissioner held that a son, adopted as Udit Narain had been, under an authority on a will, did not take as a devisee or a donee, but as an heir. "It must be recollected, "said the judgment," that the adopted son, as such, takes by inheritance not by devise. See *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (1)". The Indian Registration Act (III of 1877), s. 17, was referred to. As regards the effect of the agreement between the widow and Guman Singh, the terms signed by the latter, at any rate the latter part, he held to be illegal. The adoption, however, had, as an act completed, taken place before the documents, signed and registered by the widow, were made. The judgment continued thus:—

"An adoption once made is by Hindu law indefeasible, and after the adoption of Udit Narain Singh, the Maharani's power of adoption was, during Udit Narain Singh's lifetime, exhausted (West and Bühler, 3rd Edition, Volume II, page 1152, and Mayne's Hindu Law and Usage, s. 101). There remains the agreement that the Maharani shall, during her lifetime, have full power over the Maharaja's estate. As regards this agreement I observe that the learned Counsel for the appellant has admitted that the adoption ceremonies were duly performed, and in those ceremonies there is no place for a condition of this kind, and I am not prepared to admit that a condition of the kind can invalidate the adoption; and that, following the analogy of the Full Bench ruling of the Allahabad High Court in *Hanuman Tewari* v. *Chirai* (2), I am of opinion that in any case it must be held that *factum valet*. It is doubtful whether the agreement would bind the son when he comes of age. *Ramasami Aiyan* v. *Venkata Ramaiyan* (3).

After referring to the English law relating to the subject of powers under deeds of settlement, the Judicial Commissioner concluded as follows:—

"Nor am I able to find in the agreement anything repugnant to the terms of the Maharaja's will. It appears to me to have been the Maharaja's intention that till such time as Government should undertake the management of his property his widows should hold it. I can find no fraud upon the power or the will in the matter of the adoption of Udit Narain Singh."

On this appeal, Mr. *J. H. W. Arathoon*, for the appellant, contended that the authority to adopt was invalid. The ordinary Hindu law was not that which regulated this adoption. The provisions of the Oudh Estates Act I of 1869 had superseded in

(1) 10 Moore's I. A., 279 (311). (2) I. L. R., 2 All, 164.
(3) L. R., 6 I. A., 196 (208); I. L. R., 2 Mad., 91.

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regard to succession to a talukdari estate in virtue of adoption the ordinary law. To have fulfilled the requirements of the Act was essential; but there had not been a registration of the authority to adopt, nor of the will, which purported to contain it. He referred to the Law of Registration, as required both by the above Act and by the Indian Registration Acts VIII of 1871 and III of 1877. Again, a further objection was to be found in the fact of the boy whom the widow had purported to adopt not being within the line of succession upon intestacy recognised by the Act I of 1869. For the purpose of deciding this question, the Hindu law could not be invoked, and it could not be said that, because the boy was adopted, he was therefore within the meaning of the clause that he who takes by an unregistered will must be a person who would have succeeded upon an intestacy. As the son of Guman Singh he was outside the line of succession.

[LORD WATSON observed that without regarding the Hindu law as entirely regulating the succession, it might yet indicate to whom the estate would descend after the exercise of a power to adopt.]

The argument was that whatever the validity of the authority to adopt by Hindu law, still in regard to the special provisions of s. 13, sub-section 1, considering the distant connection of the boy's father with the testator, and the fact of the will not having been registered, the adoption was, as a result, unauthorized by the law governing the descent and devise of talukdari estates.

The strongest point against the validity of the adoption was, however, the fact that the widow, purporting to adopt under authority from her deceased husband, had entered into an agreement for her own benefit, with the father of the boy whom she purported to adopt. The terms of the agreement of 26th October 1883 indicated this; and not only in regard to the nature of the act of adoption by a Hindu widow, but in reference to the general rules of law on the subject of the execution of powers, the conduct of the widow must be held to have vitiated the alleged adoption. He referred to *Ramasami Aiyan* v. *Venkata Ramaiyan* (1), *Nilmoni Singh* v. *Bakranath Singh* (2), *Vallanki Vellata*

(1) L. R., 6 I. A., 196; I. L. R., 2 Mad., 91.
(2) L. R., 9 I. A., 104; I. L. R., 9 Calc., 187.

Krishna Rao v. *Venkata Rama Lakhsmi Narayan* (1), *Shoshinath Ghose* v. *Krishna Soondari Dasi* (2), *Duke of Portland* v. *Topham* (3), *Ganga Sahai* v. *Lekhraj Singh* (4), and to Farwell on Powers, Edition 1874.

Sir *Horace Davey, Q. C.*, and Mr. *R. V. Doyne*, with whom was Mr. *C. W. Arathoon*, for the respondents, were not called upon.

On a subsequent day (1st December) their Lordships' judgment was delivered by

LORD MACNAGHTEN.—It appears to their Lordships that this case is free from difficulty.

The will of the late Maharaja of Bulrampur, Sir Digbijai Singh, was recently under the consideration of this Board on the occasion of a claim by his junior widow to joint proprietary rights in his estate. Their Lordships then expressed their opinion that, according to the true construction of the will, the Maharaja conferred upon his senior widow (who is the first defendant in the present suit), and upon her alone, a life estate in all his property, and authority to select and adopt such minor male child of his family as she might think fit. The adoption which she was not only authorized but required to make was to be "according to the custom of the family and according to the Hindu law," and the adopted son was to "be in place of an actual son the owner of the entire *riasat*, and the assets moveable and immoveable," the widow taking a provision for her maintenance.

The senior widow selected for adoption a minor male child of the Maharaja's family. It has been admitted in this suit that "the ceremonies of adoption were duly performed." They took place on the 8th of November 1883. On the 5th of December following, the senior widow executed a deed of adoption, which was duly registered, by which she declared that, in accordance with the written permission of her deceased husband, she had

(1) L. R., 4 I. A., 1 ; I. L. R., 1 Mad., 174.
(2) L. R., 7 I. A., 250 ; I. L. R., 6 Calc., 381.
(3) 11 H. L. C., 32.
(4) I. L. R., 9 All., 256.

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adopted Udit Narain Singh (who is the second defendant to this suit), and that he would be the proprietor of the Maharaja's estate and property, both moveable and immoveable, like a real son.

The appellant, who is a distant relative of the late Maharaja, and the person upon whom, according to the rules of intestate succession prescribed by the Oudh Estates' Act 1869, in default of any widow of the Maharaja, or any son adopted by her as provided by the Act, or any male lineal descendant of such son, the Maharaja's talukhdari estate would descend, brought this suit for the purpose of having it declared that the adoption of the second defendant was invalid fraudulent and void.

Three grounds of objection to the validity of the adoption were urged before their Lordships.

In the first place it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son is exercised to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III of 1877, s. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

In the next place, it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far at any rate as regards the talukhdari property, because the adopted son was not a person who could take the talukhdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in the manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good, the appellant has to establish the proposition that the adopted son is not within the exception contained in s. 13, sub-section 1 of the Act, that he is not a person who, under the

provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the talukhdari estate or to an interest therein if the Maharaja "had died intestate" The appellant endeavoured to support that proposition by arguing that if the Maharaja had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, Udit Narain Singh would have ranked as the son of Guman Singh. But the word "intestate" in sub-section 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act; the talukh or immoveable property to which alone the Act is declared to extend. This is plain on consideration of s. 13 taken by itself, but it is made still plainer, if possible, by reference to s. 22, which is closely connected with s. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word "intestate" by the addition of the words "as to his estate."

The last point urged on behalf of the appellant was described by the learned Counsel who appeared in support of the appeal as his strongest point. It was this: The senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time, she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document, dated the 26th of October 1883, in which it was declared that she should have full control during her lifetime over the property left by the late Maharaja. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th of December 1883. But some months afterwards, on the 28th of March 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death.

On these facts it was argued that the adoption was a fraud upon the authority to adopt, and therefore void.

This point seems to their Lordships equally untenable.

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The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose, or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. Arathoon, that the child of Guman Singh was selected in preference to the child of the appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by Guman Singh or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions therefore were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. Arathoon appealed would rather suggest that, even in that case, the adoption would have been valid and the condition void.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal. *Appeal dismissed.*

Solicitors for the appellant: Messrs. *Young, Jackson & Beard.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

P. C.* 1888 *November* 7 & 9, *December* 1.

BHUGWAN DAS (PLAINTIFF) *v.* THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA (DEFENDANTS).*

[On appeal from the Court of the Additional Recorder of Rangoon.]

Insurance—Marine Insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.

An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, LORD MACNAGHTEN and SIR R. COUCH.

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that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped.

Held, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendant's agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy.

APPEAL from a decree (23rd July 1886) of the Additional Recorder of Rangoon.

The suit out of which this appeal arose was brought by the appellant for the specific performances of a contract alleged to have been made by the respondents, through their agents to issue to the plaintiff a policy of insurance on cargo shipped from Rangoon to Calcutta, there having been a refusal to issue the policy, and the ship having been lost on the voyage.

The plaint, filed 18th August 1885, alleged that on the preceding 8th March, the plaintiff agreed with Mr. James Macrory of Rangoon for a charter from the latter as owner of the ship *Copeland Isle* from Rangoon to Bombay, the latter undertaking to obtain insurance for such goods as the plaintiff should ship by her; that the plaintiff required Macrory to obtain insurance for Rs. 15,000 upon 1,000 bags of rice which he intended to ship, and disbursements on account of the vessel; and that Macrory applied to the agents of the defendant company at Rangoon to take an insurance risk to that extent, which the agents agreed to do, and in due course issued an open cover for the same. This open cover Macrory endorsed and made over to the plaintiff, in accordance with custom, and the plaintiff thereupon executed a charter-party. He afterwards shipped 1,000 bags of rice on the *Copeland Isle*, and disbursed on her Rs. 4,000, writing on 31st March 1885 to the agents requesting them to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000; also on the disbursement of the vessel from Rangoon to Bombay, Rs. 5,000; and enclosed the premium. The

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plaint further alleged that the defendants refused to issue the policy; and lastly, the total loss of the *Copeland Isle*, and claimed specific performance.

The defendants by their answer denied that the open cover was given to Macrory as such, but alleged that it was given in answer to his question whether the Company was prepared to insure rice by that ship, and in order to be shown to other insurance agents as indicating that they considered the ship a fair risk. The form was not signed by the agents, nor registered by them in the Company's books, as it would have been had it been issued as a preliminary to granting a policy. They further alleged that the plaintiff was informed of the facts before the sailing of the ship; and that the open cover made no mention of disbursements: also that the indorsement and transfer took place without their knowledge, or notice to them; and they denied the alleged custom as to transfer of open covers: stating that Macrory had no insurable interest in the rice shipped, and that the Company was not liable for the amounts claimed.

Issues were fixed raising the principal questions whether the open cover was a contract which the plaintiff could claim to have specially performed; under what circumstances it was granted to Macrory; and whether it was transferable or assignable by him.

The Additional Recorder found that what took place at the issue of the open cover was the following:—

"Macrory wanting to get a charter for his ship applied to the plaintiff who entered into negotiations with him and approved of the terms of the proposed charter-party: the plaintiff, however, made one essential stipulation, before concluding the charter-party; and that was that Macrory should produce to him something to show that insurance risks would be taken by the insurance companies on the cargo shipped by the vessel. In order to satisfy this stipulation Macrory went to various insurance offices starting with the agents of the defendant Company, and obtained the document sued upon, and four other open covers, which he endorsed over to the plaintiff, who then executed the charter-party. What happened seems to have been done in pursuance of a practice which has been followed by other local shipowners like Mr. Macrory, who, according to the evidence of

Mr. Borland, apply to insurance agents here for open covers in order to be able to show them to persons whom they may ask to charter their vessels as a guarantee that cargo shipped by them will be insured."

The facts attending the plaintiff's application to Messrs. Gladstone, Wyllie & Co., as the defendants' Agents, to declare policies of insurance on the rice, and on disbursement, and their refusal, with the material part of the correspondence thereupon,—are set forth in their Lordships' judgment.

The Additional Recorder was of opinion that the contract to issue a policy had never been enforceable, by reason of Mr. Macrory's not having had any insurable interest in the rice shipped in the *Copeland Isle*. He had no doubt that the giving of the open cover might initiate a contract for insurance. But of that contract one of the most essential principles was that the assured should have at the time of the making of the contract an insurable interest in the subject-matter insured, and no such interest existed at the time. He was also of opinion that no custom in variation of this general principle, admitting the transferee who ultimately might become the shipper, to stand in the place of a person receiving the open cover, had been proved to prevail in Rangoon. Nor in his opinion did the relation of agency between the plaintiff and Macrory exist, it being the fact that at the time when Macrory was effecting the arrangements which he made with the insurance agents, it was uncertain whether the plaintiff would ship any rice on board the vessel. For these reasons he dismissed the suit with costs.

Mr. *J. Gorell Barnes, Q.C.*, and Mr *A. Agabeg*, for the appellant, argued that the judgment was incorrect in holding that the case turned on the absence of an insurable interest in Macrory at the time when he received the open cover. It had been settled for a century past that it was sufficient for the party assured to have an interest at the date of the contract. This the plaintiff had when he accepted the offer of insurance previously made in the open cover. The contention on his behalf was that he accepted the terms offered to any shipper who should ship under charter with Macrory, which terms, in effect, were those of the open cover. It was further contended for the appellant that

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when he signed the charter-party, which he did upon the faith that he could have the policy referred to in the open cover, there was an adoption by the appellant of the terms, and thereupon a completed contract between him and the respondents who had offered those terms. The Court below had erred in holding that the evidence as to the mercantile usage regarding the issue of open covers was insufficient and in not holding that the plaintiff as principal was entitled to enforce the contract on which he sued.

They referred to Arnould on Insurance, 6th Edition, Part 10, Chapter III; *Sutherland* v. *Pratt* (1); *Irving* v. *Richardson* (2); *Routh* v. *Thompson* (3); *Fisher* v. *The Liverpool Maritime Insurance Company* (4); The Specific Relief Act, I of 1877, s 22; Fry on Specific Performance.

Mr. *A. Cohen, Q.C.*, and Mr. *R. G. Arbuthnot*, for the respondent Company, argued that the suit had been rightly dismissed. Macrory could not, by assigning the so-called open cover, confer greater rights on another than he had in himself; nor had the supposed custom, to issue open covers by the insurance agents to serve as an offer to any shipper subsequently coming forward to accept them, been proved to prevail in Rangoon. There were doubts how far such a custom would be enforceable. Again, it was argued that there was ground for the finding that there had been no relation of principal and agent between the appellant and Mr. Macrory in the obtaining the open cover; as to which it was open to doubt whether the document had been given as an open cover at all. Its effect might be considered to have been only that the Company regarded the shipment as a fair risk. Lastly, as to the acceptance, without which the case for the appellant must fail, to whom could it be said to have been addressed; and when was it complete. In regard to these points, the evidence did not enable the plaintiff to recover. They cited *Dickenson* v. *Dodds* (5), *Mackenzie* v. *Coulson* (6).

(1) 11 M. & W., 296.
(2) 1 Mood. and Rob., 153; 2 B. and Ad., 193.
(3) 11 East, 433; 13 East, 279.
(4) L. R., 8 Q. B., 469; L. R., 9 Q. B., 425.
(5) L. R., 2 Ch. D., 463.
(6) L. R., 8 Exch., 368.

Mr. *J. Gorell Barnes, Q.C.*, replied, arguing that there had been a complete acceptance by the plaintiff of a previous offer, made through and by means of the open cover, in which there was no necessity for persons to be named. He cited *Weidner* v. *Hoggett* (1), *Ionides* v. *Pacific Insurance Company* (2), *Great Northern Railway Company* v. *Witham* (3), *Morrison* v. *Universal Marine Insurance Company* (4), *Lishman* v. *Northern Maritime Insurance Company* (5).

Their Lordships' judgment was afterwards (1st December) delivered by

SIR R. COUCH—The appellant in this case brought a suit against the respondents, for specific performance of a contract of insurance. The Recorder of Rangoon, in whose Court it was brought, dismissed the suit with costs, and this appeal is from that judgment.

In March 1885, one John Macrory, a ship builder and owner of a vessel called the *Copeland Isle* then lying in Rangoon river, applied to the plaintiff, a merchant carrying on business at Rangoon, and also at Calcutta and Bombay, to charter that vessel. The evidence of the plaintiff, who was examined as a witness, was as follows:—

"I said to Macrory that if an open cover were given to me free of particular average, I would charter the vessel. When the charter-party was drawn and brought to me by Macrory and Sutherland (one of the brokers who arranged the charter) I said: 'Where is the open cover?' Then Mr. Macrory gave me this open cover, with these five others. When I got these the charter-party was signed by me. I shipped goods on the *Copeland Isle*. I shipped my own goods, 6,220 bags of rice. This is a copy of the charter-party. Subsequently I went to Messrs. Finlay Fleming, Messrs. Strang Steel, and Messrs. Gladstone Wyllie's, for policies on the covers. I got policies from all, except from Messrs. Gladstone Wyllie. I went to Gladstone Wyllie's

(1) L. R., 1 C. P. D., 533.
(2) L. R., 6 Q. B., 674.
(3) L. R., 9 C. P. D., 16.
(4 L. R., 8 Exch., 40.
(5) L. R., 8 C. P., 216; L. R., 10 C. P., 179.

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and saw Mr. Bertram. I went three times to them before I wrote to them. Once I saw Mr. Bertram, and twice Mr. Gordon. I showed Bertram the open cover, and asked him for policies for Rs. 10,000 for 1,000 bags of rice, and Rs. 5,000 for disbursements. Mr. Bertram said: 'We have given a policy to a chetty.' That was, I believe, for Rs 17,500. I said: 'I have no concern with the chetty's policy. I want the policy for my goods.' Bertram said he would not give one. I then went to Gordon, who was the then Manager of Gladstone Wyllie's. Gordon said: 'I cannot give a policy, go to Mr. Macrory.' I went that day or the next day with Macrory to Gordon. Macrory asked Gordon to give the policy, as the ship was to be cleared. He spoke for a long time, and so did I. We both pressed Gordon to give one, but he said he would not. Then I said: 'If you do not give one I will send the customary notice.' Afterwards I addressed a letter to Gladstone Wyllie as the agents of the defendants' company."

The open cover was in these terms:—

"*Rangoon, 9th March* 1885.

"NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

"Dear Sir,

"We hereby consider you insured under an open cover to the extent of rupees fifteen thousand only, on rice per *Copeland Isle*, Captain———, Rangoon to Bombay.

"Premium, 2 per cent.

"Free of war risks.

"Average f. p. a.

"Policy to be applied for before the ship sails, and vessel to be towed by steamer to sea.

"Yours faithfully,
"GLADSTONE WYLLIE & Co.,
"J. R. BERTRAM,
Agents in Rangoon.

"To R. MACRORY, ESQ."

(On the back:) "J. MACRORY."

The letter to Gladstone Wyllie as the defendants' agents abovementioned was dated the 31st March 1885, and requested them

to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000, and on disbursements of the vessel from Rangoon to Bombay Rs. 5,000, and it enclosed Government promissory notes for Rs. 300 for the premium. Gladstone Wyllie & Co. replied by letter, dated the 1st April 1885, saying: "As we did not grant you an open cover by the *Copeland Isle*, we regret we cannot issue a policy, and we return Rs. 300 in Government currency notes which you sent us." On the 1st April the plaintiff again wrote, stating that Macrory had transferred the open cover to him, and enclosing it with the Government notes, to which Gladstone Wyllie & Co. replied on the 2nd April that they could not recognize the transfer by Macrory of the open cover, and that they never entered into any engagement to grant the plaintiff a policy for Rs. 15,000.

Although the plaintiff at the interviews with Bertram and Gordon, and in his letter of the 31st March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the defendants' agents did not take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the defendants cannot say that the plaintiff was not willing to take a policy on rice for Rs. 15,000. Whether upon such a policy he could recover the disbursements or the Rs. 4,000 advanced on account of freight it is not now necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the defendants' agents refused to issue a policy to the plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in Rangoon and Bombay, but did not succeed. The *Copeland Isle* proceeded on her voyage to Bombay on or about the 1st April 1885, and was totally lost in a cyclone on the following 10th of June.

To return to the evidence. About the open cover, Macrory said (omitting passages which it is not necessary to read):—

"I remember this open cover. I got it for the charterer, Bhugwandas. I was to see if an insurance could be effected on the cargo before he would sign the charter-party. I made it over to Bhugwandas, and endorsed it. . . . I made all the

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covers over to him on his signing the charter-party. . . . I saw Mr. Gordon when I first got this open cover. . . . I asked Mr. Gordon if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to show to other Companies, and not as an undertaking to issue a policy. . . . Mr. Bertram was present in Gordon's room when I had the conversation with Mr. Gordon, and immediately after I got the open cover . . . I went out of Gordon's room with Bertram. I got the open cover from Bertram in his room. I talked to Bertram there about the ship and the money I had expended on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned Bhugwandas as the charterer. . . . I asked Gordon whether he would insure a part of the cargo, or as much as he could take. When he said he could take up to Rs. 15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put the stamp on."

Mr. Gordon was not examined as a witness, and there was a satisfactory explanation of this omission. Mr. Bertram was examined and said :—

"I am an assistant in the firm of Messrs. Gladstone Wyllie & Co., in Rangoon. The firm are the agents of the defendants' Company in Rangoon. I saw Macrory on the 9th March 1885 with reference to the vessel the *Copeland Isle*. He came to me personally at half-past two. . . . He asked me for a chit to show the other insurance offices that we were prepared to take insurance on the *Copeland Isle ;* of course that had reference to what had previously taken place when the matter was arranged by Mr. Gordon. . . . I heard Gordon tell Macrory that he would be willing to take a risk up to Rs. 15,000 on the vessel for the defendant Company. . . . At this second interview Macrory asked if we would give him a letter to show to Steel's and to Finlay's so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to show to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me

to fill up this form than to write an open letter. . . . We said that we were prepared to accept a risk on the *Copeland Isle* to the extent of Rs. 15,000. Nothing was said about giving an open cover or a policy. Gordon said this. . . . We knew at the time Macrory had no rice to ship."

Mr. John Anderson, a witness for the plaintiff, whose firm are agents for several Marine Insurance Companies in Rangoon, said :—

"An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us, notwithstanding the open cover had been issued in another person's name." On cross-examination he spoke to the same effect.

Mr. John Borland, another witness for the plaintiff, whose firm at Rangoon also are agents for several Marine Insurance Companies, said: "If we issued an open cover to *A*, and afterwards *B* shipped the cargo, we should have no objection to issuing the policy to *B*." And on cross-examination: "I have many times issued an open cover to a man who has not an insurable interest. If Macrory came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper."

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to Macrory in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When he handed it to Bhugwandas it was a subsisting proposal capable of being accepted by him, and when Bhugwandas went to Gladstone Wyllie's and showed Bertram the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with Bhugwandas to insure and issue a policy in terms

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of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as Bertram absolutely refused to give any policy.

The letter of the 1st April 1885, refusing to issue a policy, and of the 2nd April, refusing to recognize the transfer to Bhugwandas of the open cover, have been noticed. It is to be observed that neither in the interviews with Bhugwandas, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Indeed, in the letter of 2nd April it is so called. It was argued by the learned Counsel for the appellant that the contract became complete when the charter-party was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by Bhugwandas was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Bramall & White.*

Solicitors for the respondents: Messrs. *Freshfield & Williams.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Wilson.

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March 18.

SOWDAMINI DASSI (PLAINTIFF) *v.* BROUGHTON AND OTHERS (DEFENDANTS).*

Hindu Law—Widow—Accumulations—Period up to which accumulations may be dealt with—Intention to accumulate.

Under the will of *N. C. M.* the testator left his estate to his brother provided that, within a term of eight years, no son should be born to such brother, capable of being adopted as a son of the testator, in accordance

* Appeal No. 1 of 1889, from the decision of Mr. Justice Trevelyan, dated 12th August 1887, in suits numbered 53, 64 and 141 of 1887.

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with certain conditions made in the will. These conditions failed, and on the expiration of the term of eight years, the estate vested in the brother. The will made no provision for disposal of the rents and profits of the estate during the period the succession thereto was in abeyance. Disputes having arisen between the widow of the testator and his brother, as to the right to such rents and profits, the brother eventually agreed to pay, and did pay over to the widow a large sum by way of settlement of these disputes, for which sum the widow executed a release.

The widow invested the sum so received in Government Securities, and twenty years afterwards created, with this fund, a trust in favour of one *G. C. R.*, and appointed *B.* trustee thereof. On the death of the widow, the daughter of the testator tried to set aside this trust, claiming the funds as a portion of their father's estate with which the widow had no right to deal: *Held* that, as the accumulations were handed over to the widow by the person entitled to the reversion after the estate had vested in him, and a release had been entered into between them, no presumption arose that the fund in question had been accumulated by the widow for the benefit of other heirs of the testator, and that there being no such presumption, the facts of the case must be looked at to ascertain the intention of the parties regarding this fund; *held*, as to this, that the conduct of the widow evidenced no intention to accumulate the sum received by her for the benefit of any person but herself, or that she ever intended to give up the power of disposing, expending, or dealing with it in any way.

THIS was an appeal against the judgment of Mr. Justice Trevelyan, dated the 12th August 1887.

The case in the Court below is to be found reported in I. L. R., 14 Calc., 861, under the name of *Grish Chunder Roy* v. *Broughton*. That report purports, on the face of it, to be solely a report of one case brought by Grish Chunder Roy against Mr. Broughton Surut Kumari and Sowdamini Dassi to enforce the trusts set out in the deed of trust and deed of settlement executed by Badam Kumari Dassi, on the 12th July 1886; but, at the hearing of the suit before Mr. Justice Trevelyan, two other cases were heard with it, *viz.*, a suit brought by Sowdamini Dassi against Mr. Broughton and Grish Chunder Roy and Surut Kumari Dassi to have the trust deed of the 12th July 1886 set aside, and an application for probate of the will of Badam Kumari Dassi; for the sake of convenience, one of these cases only was reported in the lower Court; the appeal from this judgment of Mr. Justice Trevelyan, which gives a judgment in all three of the above cases, was appealed against by Sowdamini alone.

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It will only be necessary to state so much of the facts of these cases as refer to the one question, as to whether Badam Kumari had power to deal with, under the deeds of the 12th July, the sums of money paid to her by Shama Charan, or whether such sum had become a portion of the corpus of her husband's estate, which she could not so deal with according to Hindu law.

One Nobo Kumar Mullick died on the 16th March 1856, having made his will, and leaving him surviving, his brother Shama Charan, his widow Badam Kumari and four daughters, amongst which latter were Surut Kumari Dassi and Sowdamini Dassi referred to above.

By his will Nobo Kumar appointed his widow and his brother executrix and executor. The 9th clause of the will was as follows: "Should my executor, Shama Charan, my younger brother, have more than two sons, within eight years from this date, in that case such son shall be made my adopted son; should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother within the specified time of eight years, power is reserved for adopting up to the extent of a third time; should my brother have no more than two sons, or the adopted sons should die one after the other, in that case the share belonging to me of Company's Paper, and lands, and houses, and gardens, and so forth, the whole, real and personal estate will be received by my younger brother Shama Charan."

Under the events which happened, the residuary estate referred to fell to Shama Charan. No provision was made by the testator for the disposal of the rents and profits of the estate during the period, eight years, above referred to, during which the succession to the property remained in abeyance.

Disputes having arisen between Badam Kumari and Shama Charan as to their respective rights to the income accrued, due during the aforesaid period of eight years, Shama Charan, in August 1866, in settlement of these disputes, paid over to Badam Kumari a sum of Rs. 2,89,000, and she thereupon executed, in favour of Shama Charan, a deed of release, in which release she described this sum of money as being the accumulations of the property of Nobo Kumar Mullick.

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After dealing with portion of this sum, and investing interest accruing on the principal in the same way in which the principal was invested, *viz.*, in Government Paper, she, on the 12th July 1886, made over to Mr. Broughton a sum of Rs. 2,69,500 in Government Paper to be held by him as trustee for the benefit of her grandson, Grish Chunder Roy, executing on that day a deed carrying these trusts into effect. On the 7th September 1886, Badam Kumari died. The suits above referred to were in 1887 filed for the purpose mentioned, and this was an appeal from the judgment of Mr. Justice Trevelyan in those cases.

Mr. *Pugh*, Mr. *Evans* and Mr. *Allen* for the appellant.

Mr. *Bonnerjee* and Mr. *Roberts* for Surut Kumari.

Mr. *Woodroffe* and Mr. *Hill* for Grish Chunder Roy.

Mr. *Phillips* and Mr. *Stokoe* for Mr. Broughton.

Mr. *Pugh*.—There was an intestacy as regards the accumulations of income for the eight years. Under the deeds, the accumulations were treated as an increment to the estate: at the time Badam Kumari received them, she might have spent them. [WILSON, J.—But she never received them.] Yes, under the arrangement with Shama Charan; the deed of settlement recites that she is entitled to the eight years' accumulations for her own use and benefit. Twenty years after the release she is said to have desired to set up Grish Chunder Roy. Whatever she saved she kept separate, as also her *stridhan*. I submit that the accumulations were part of the residuary estate of N. K. Mullick, and a portion of it was made over to her, and kept apart by her. As to the law, I refer to Mayne's Hindu Law, para. 580 *et seq*: *Grose* v. *Amirtamayi Dasi* (1) [that case has never been departed from in this Court], *Rabutty Dossee* v. *Sibchunder Mullick* (2), *Soorjeemoney Dossee* v. *Denobundoo Mullick* (3), *Gonda Kooer* v. *Kooer Oodey Singh* (4),

(1) 4 B. L. R., O. C., 41.
(2) 6 Moore's I. A., 1.
(3) 9 Moore's I. A., 123.
(4) 14 B. L. R., 159, 165.

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Isri Dutt Koer v. *Hansbutti Koerain* (1), *Puddo Monee Dossee* v. *Dwarka Nath Biswas* (2), *Sheolochun Singh* v. *Saheb Singh* (3), *Rivett-Carnac* v. *Jivibai* (4).

Mr. *Evans* on the same side.—The old law was that a widow should frugally enjoy the estate (3 Colebrooke, 576). The onus is on the person contending that the accumulations do not go with the husband's estate to show special circumstances. This is how it stands on the later authorities cited. The questions are, What had happened up to the date of the release? And what was the intention of the parties to the release? [WILSON, J.—There are statements of the widow's intentions which are in your favour, namely, that she was claiming the money as part of her husband's estate.] Yes, at the time she so declared her views, and it was not till long after that that she set up a claim to treat it as part of her own *stridhan*. The presumption is in my favour unless displaced by strong facts. The facts are also in the appellant's favour; for during the eight years before the release, there was nothing done to alter the position of matters. The widow was waiting to see if a son was adopted. If she had so desired (she was co-executrix with Shama Charan), she could have demanded and spent the money; but that was not a proper course, and she did not adopt it. Then at the time of the release she claimed it as a part of her husband's estate and not as her *stridhan*.

Mr. *Hill* for Grish Chunder Roy.—I contend the release shows that the widow claimed the income as belonging to herself; there is, first, a series of colourless acts, and then express acts declaring her intention, and what her intentions had always been. The question is rather one of fact than of law, did she treat it as part of her husband's estate? [WILSON, J.—The cases say that you have to show affirmatively that there was something done to take it out of her husband's estate.] We have to see the intention with which the accumulation was made, and I say the facts show that she took it out of her husband's estate. On the entire facts we start with an indication that it is not to

(1) L. R., 10, I. A., 150; I. L. R., 10 Calc., 324.
(2) 25 W. R., 335 (341).
(3) I. L. R., 14 Calc., 387.
(4) I. L. R., 10 Bom., 478.

go with the bulk of the estate, and she claims it as her own. The long continued investment is enough to show that it was severed. The cases cited are distinguishable; no case shows that when there is no other estate of the husband in a widow's hands, and she is dealing only with a lump sum, the cases as to increment to the husband's estate apply. *Panulal Seal* v. *Bamasundari Dasi* (1) shows that the widow is entitled absolutely to the accumulations of income from her husband's estate.

Mr. *Woodroffe* on the same side.—In the old books, accumulations and accretions are treated conjointly. The case of *Grose* v. *Amirtamayi Dasi* (2) differs from previous decisions, and is not warranted by them, and is contrary to *Soorjeemoney Dossee* v. *Denobundoo Mullick* (3); here there was an accumulation by the widow, and, if so, was there any intention to make it an increment to the estate? There was not, there was only a saving of income. There is no evidence that she made the investment for the benefit of her husband's heirs. The husband had determined by his will that his heirs were not to have his estate. The mere fact of investment raises no presumption of intended accretion. The use of the word "accumulations" in the release is not conclusive, it is merely in the sense of monies being unexpended. As to the widow's power over income, see *Puddo Monee Dossee* v. *Dwarkanath Biswas* (4). The case of *Sheolochun Singh* v. *Saheb Singh* (5) is authority for showing that her prior intention may be gathered from the actual disposition that she made.

Mr. *Phillips* for Mr. Broughton.—The widow had a lakh of rupees left her under the will: her husband imposed upon her no duty to accrete to his estate. Is there any duty on the part of the widow to accrete to the husband's estate when it is left away from her? I submit not. Here the widow does not stand in the ordinary position of a Hindu widow; here there was nothing to which the accumulations could accrete. As to the investment, Government Paper is the most realisable form for it to take, next to leaving it in money. As to the form of the release, it does not show an intention to accrete the money.

(1) 6 B. L. R., 732.
(2) 4 B. L. R., O. C., 41.
(3) 9 Moore's I. A., 123.
(4) 25 W. R., 335 (339).
(5) I. L. R., 14 Calc., 387.

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Mr. *Pugh* in reply.—The main contention on the other side is that the monies are not "accumulations." As to what an accumulation is, see Macnaghten's Hindu Law, 258, and 1 Strange's Hindu Law, 246.

The judgment of the Court (PETHERAM, C.J., and WILSON, J.) was delivered by

PETHERAM, C.J.—This appeal arises out of three proceedings. The first of them was a petition for obtaining the probate of the will of a person called Badam Kumari, which is numbered 53 of 1887 ; the second was a suit brought by Grish Chunder Roy against Mr. Broughton, the Administrator-General of Bengal, Surut Kumari Dassi and Sowdamini Dassi to carry out the trusts of two deeds, dated the 12th July 1886, and that is numbered 64 of 1887 ; and the third was a suit brought by Sowdamini Dassi against Mr. Broughton Grish Chunder Roy and Surut Kumari Dassi to obtain a declaration that the deed of trust of the 12th July 1886 is void, and that the plaintiff Sowdamini is entitled to a share of the funds dealt with by that deed, and that suit is numbered 141 of 1887.

The property which is in dispute in these suits are the savings from the income of an estate left by a person called Nobo Kumar Mullick. Nobo Kumar Mullick died on the 16th March 1856, leaving him surviving his widow Badam Kumari, whose will is in dispute in these proceedings, and four daughters of whom one is Sowdamini the plaintiff in the third proceeding, and another Surut Kumari, one of the defendants in that suit and in the other suit.

Nobo Kumar Mullick left a will, and by the terms of that will, and that is the only thing in it which is material here, he appointed his widow and his brother, Shama Charan Mullick, his executrix and executor, respectively, and in the 9th clause of the will he provided that "should my executor Sreeman Shama Charan Mullick, my younger brother, have more than two sons within eight years from this date, in that case such son shall be made my adopted son ; should such adopted son die within the said appointed period of eight years, in that case should there be other sons of my brother, within the specified time of eight years, power

is reserved for adopting up to the extent of a third time ; should my brother have no more than two sons, or the adopted sons should die one after the other, in that case the share belonging to me of Company's Paper, and lands and houses and gardens, and so forth, the whole real and personal estate, will be received by my younger brother, Sreeman Shama Charan Mullick."

Shama Charan Mullick had not more than two sons within eight years of the date of the testator's death, and so the residuary estate became his. The testator made no provision for the disposal of the rents and profits for the eight years during which the succession to the property remained in abeyance, and then his widow, as his heiress, became entitled to them ; but during these eight years she did not receive these rents and profits.

Disputes arose between Badam Kumari and Shama Charan Mullick regarding their respective rights to the accumulations of these eight years, and in settlement of those disputes Shama Charan, on or about the 13th August 1866, paid Badam Kumari a sum of Rs. 2,89,000.

The dispute which arises in these proceedings is with reference to that sum, and the first point which it is necessary to note here, it is not specifically noted in Mr. Justice Trevelyan's judgment, is that at the time that sum was paid by Shama Charan Mullick to Badam Kumari, the eight years had expired, and Shama Charan Mullick had himself become entitled to the entire estate of the deceased, and was actually in possession.

That being the state of things, when that money was paid over Badam Kumari executed a deed of release to Shama Charan Mullick, and she recites in it that a question had arisen between her and Shama Charan as to who was entitled to this money, she describes it as the accumulations of the property of Nobo Kumar Mullick, which was then in the hands of Shama Charan Mullick, and that upon the payment of that sum of money by him to Badam Kumari, she, Badam Kumari, executes to him an absolute release.

Badam Kumari lived for twenty years after executing that release. During that time these funds remained in her hands, and were dealt with by her, a portion of the income from that sum being spent by her, and a portion of it re-invested in Government

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Securities in the same way as the fund itself had been, and on the 12th of July 1886, she handed over a large sum of money to Mr. Broughton, and endorsed notes to the extent of Rs. 2,69,500, part being principal and part the accumulations of the interest which she herself had invested in that way, to Mr. Broughton, and executed a deed by which she constituted him the trustee of that fund, settling it upon one of her grandchildren, the son by a daughter; and these proceedings are now brought by the other daughters to contest that transaction. First of all they say that as a matter of fact, at the time this deed was executed and this will was made, this being done about the same time, she did not know what she was doing, and that the documents were not explained to her, and that consequently they must be set aside; and in the next place they say, even if that were not so, she legally had not power to dispose of this property, because it consisted of accumulations to her husband's estate, and so could not be dealt with by her.

The first point was a question of fact as to whether this transaction was explained to her, so that she knew what she was doing, and her mind went with what she was doing. Mr. Justice Trevelyan has come to the conclusion that the deeds were properly explained to her, and that she knew what she was doing, and intended to do what appears by the documents she has done; and I do not think it necessary to say more as to that than that I agree with the view taken by Mr. Justice Trevelyan on the facts, so that if she had power to make this disposition of the property, this disposition is valid.

The question that then arises is as to whether she had power to deal with this fund, or whether it had become a portion of the *corpus* of the husband's estate which she could not deal with.

As to that, it is to be noticed that her position was that she had a Hindu widow's estate for the eight years which elapsed before Shama Charan's interest vested. And he took possession of the residue, and this claim is not made by Shama Charan, the person who is now entitled to the *corpus* of Nobo Kumar's estate and who took possession of it on the expiration of the eight years, but is made by the daughters of Nobo Kumar who

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would have been the persons who would have taken anything which remained of the accumulations of those eight years if this woman had died pending the eight years, and who would not have been entitled to the *corpus* of the estate in any sense whatever, because that was to go to Shama Charan by the will of Nobo Kumar if no son were adopted.

Therefore the present claim is made not by the person entitled to the estate of Nobo Kumar, but by persons who would have been entitled only to a small share of it, if this woman had died before the expiration of the eight years.

The cases on the subject are fully examined and discussed in the case of *Isri Dutt Koer* v. *Hansbutti Koerain* (1), and the discussion is continued in the case of *Sheolochun Singh* v. *Saheb Singh* (2), and so much of the law as is applicable to this case is to be found in the judgment of Sir Richard Couch in the last case. He says there, when a widow comes into possession of the property of the husband, and receives the income, and does not spend it but invests it in the purchase of other property, their Lordships think that, *primâ facie*, it is the intention of the widow to keep the estate of the husband as an entire estate, and that the property purchased would, *primâ facie*, be intended to be accretions to that estate. If the case here were that the persons who were claiming this fund were the persons who were entitled to the entire estate of Nobo Kumar, that *dictum* would be strong to show that, *primâ facie*, this money having accumulated in the hands of the person possessed of a particular estate, and having been invested by her, must be taken to have been so accumulated and so invested in order to increase the estate of the husband. But that is not the case here, and that cannot be the case here, because the accumulations were handed over by the person entitled to the reversion to this woman after the entire estate had vested in him, and the matters were released as between themselves. Therefore it seems to me that there is no presumption here of its having been accumulated by her for the benefit of the other heirs of Nobo Kumar. Then the case of *Sheolochun Singh* v. *Saheb Singh* (2) would indicate that, if

(1) L. R., 10, I. A., 150. (2) I. L. R., 14 Calc., 387.

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there is no presumption of that kind, then you must look to the facts of the case to ascertain what the intention of the parties was with regard to this fund.

Mr. Justice Trevelyan, in his examination of the evidence in this case, has come to the conclusion that there is nothing to indicate an intention on the part of Badam Kumari to invest these monies for any one's benefit but her own. There is nothing from what took place, to indicate that she intended to hold this money for the benefit of any other person, or to give up the control of it by herself. In my opinion, that view is a correct view of the evidence in this case. I think that the conduct of Badam Kumari during these years shows that she had no intention of accumulating this fund for any one's benefit but her own or that she ever intended to give up the power of disposing, spending, and dealing with it any way, and, as in this case it does not seem to me that the presumption that the money, *primâ facie*, was supposed to be accumulated for the benefit of the husband's estate arises, I think that the conclusion to which Mr. Justice Trevelyan came was correct, and that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

Attorneys for the appellant: Messrs. *Remfry and Rose*, Baboo *Ashutosh Dhur*.

Attorneys for the respondents: Messrs. *Watkins and Co.*

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

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KHUDIRAM MOOKERJEE (OBJECTOR) *v.* BONWARI LAL ROY (PETITIONER).*

Hindu law—Guardian—Right to guardianship of Hindu widow—Grant of certificate of administration under Act XL of 1858.

The relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. A certificate of administration, under Act XL of 1858, was therefore granted to one of the former in preference to the latter.

* Appeal from Order No. 25 of 1889, against the order of R. F. Rampini, Esq., Judge of Burdwan, dated the 12th of January 1889.

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THIS was an application for a certificate of administration to the estate of a female minor under Act XL of 1858. The applicant, Bonwari Lal Roy, was the brother of the minor. The application was opposed by Khudiram Mookerjee, the sister's son of the husband of the minor, who was a reversionary heir to the property of the minor's deceased husband. The father of the minor was alive, but it appeared that he did not wish to take out the certificate himself, and that he consented to its being granted to the applicant. It also appeared that a certificate of administration of the minor's property had been previously granted to the mother of the minor's deceased husband, and that this certificate was recalled under the provisions of s. 21 of the Act, because her advanced age rendered her unfit to manage the property.

The Judge granted the application.

Khudiram Mookerjee appealed to the High Court.

Baboo *Monmotho Nath Mitter* for the appellant.

Mr. *R. E. Twidale* for the respondent.

The judgment of the Court (BEVERLEY and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This is an appeal against the order of the District Judge of Burdwan, appointing the respondent as the guardian of a minor Hindu widow; and the only question raised before us is whether the respondent, who is the brother of the minor, or the appellant, who is her husband's sister's son, and the reversionary heir, has the preferential right to the certificate.

It appears that a certificate had been granted to the minor's mother-in-law, which was subsequently recalled by reason of her unfitness to manage the property owing to her extreme old age; and the only reason assigned by the learned Judge for giving preference to the minor's paternal relations seems to be the fact of a certificate having once been granted to one of her husband's relations and of its having been subsequently recalled.

That in our opinion would be no good reason for passing over the claims of other relations on her husband's side, if no other reason is made out against them, and if under the Hindu law they are entitled to the certificate in preference to the widow's paternal relations.

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Now under the Hindu law, we think that the relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. This is clear from the text of Nareda, Chapter XIII, *verses* 28, 29, cited in the Dayabhaga, Chapter XI, s. 1, paragraph 64. That text runs thus:—"When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself as well as in her maintenance they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *sapinda*." This text has been followed in three cases, one to be found in Macnaghten's Principles and Precedents of Hindu Law, Volume II, page 203; another, *Kishen Mohan Mitter* v. *Khettermoni Dassi* (1); and a third, the case of *Bai Kisar* v. *Bai Gunga* (2).

This, we think, is ample authority in support of the appellant's contention, and the certificate in this case ought therefore to be granted to the appellant against whose fitness nothing has been said.

The result is that the appeal will be allowed with costs.

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Tottenham.

1889 *March* 21.

AKSHAYA KUMAR DUTT (DEFENDANT) *v.* SHAMA CHARAN PATITANDA (PLAINTIFF).*

Enhancement of rent—Settlement of a Government Khas Mehal—Regulation VII of 1822—*Bengal Act III of* 1878—*Bengal Act VIII of* 1879, *ss.* 10—14.

In order to make the enhanced rent, stated in a *jummabundi*, settled under Regulation VII of 1822, binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law, with reference to enhancement of rent, in force at the time of such enhancement.

* Appeal from Appellate Decree No. 1057 of 1888, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 14th of March 1888, affirming the decree of Baboo Srinath Pal, Munsiff of Diamond Harbour, dated the 21st of April 1887.

(1) 2 Hay, 196; Marsh, 313. (2) 8 Bom., A. C., 31.

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D'Silva v. *Raj Coomar Dutt* (1), *Enayetoollah Meah* v. *Nubo Coomar Sircar* (2) and *Reazooddeen Mahomed* v. *McAlpine* (3) followed.

The rent of a Government Khas Mehal can only be enhanced by the same process as the rent on any private estate.

Quære:—Whether a *jummabundi* is a public document?

THIS was a suit brought by an izarahdar to recover rent from a tenant.

The plaintiff stated that he formerly held an izarah of certain lands under Government; that on the expiration of such izarah, Government held the lands khas, and when so holding took, in the year 1283 (1876-77), a measurement of the said lands, the result of which was (amongst other matters) that the defendant, who was a ryot under Government, and who formerly held a *jumma* of Rs. 780, was found to be holding 1,374 bighas of land, and was assessed according to the *jummabundi* at Rs. 950-2-1, and he therefore entered into a kabuliat in respect of this land at the rate mentioned.

Subsequently to the measurement and *jummabundi* being confirmed by the Board of Revenue, the plaintiff took an izarah of the whole Mehal for twenty years at an annual *jumma* of Rs. 3,000.

The defendant fell into arrears with his rent, and the plaintiff, as his superior landlord, sued him for the same at the enhanced rent settled by the Government in the year 1283.

The defendant denied that the rent had ever been enhanced or that he had ever assented to the *jumma* fixed by the new assessment.

The Munsiff found that the *jummabundi* had been prepared under Regulation VII of 1822, and that it was unnecessary that the defendant should have consented to the *jummabundi*; that the defendant had not, in accordance with s. 10 of Bengal Act VIII of 1879, contested by suit the assessment made by Government; and that, therefore, he was liable to pay the rent recorded against his name in the *jummabundi*.

The defendant appealed to the District Judge, who found that it was not clear whether the settlement by Government was

(1) 16 W. R., 153. (2) 20 W. R., 207.
(3) 22 W. R., 540.

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made before or after Bengal Act VIII of 1879 came into force, but that for the purposes of the appeal he assumed the settlement to have been made under Regulation VII of 1822, and held that there was nothing in either Regulation VII of 1822 or in Bengal Act VIII of 1879 or the present Tenancy Act requiring a ryot's assent to the *jumma* imposed, or making it necessary for the zemindar to serve a special notice on him, calling upon him to attend at the settlement; he therefore dismissed the appeal.

The defendant appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey* for the appellant.

Baboo *Doorga Mohun Das* and Baboo *Sarut Chunder Roy* for the respondent.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was as follows:—

In this case the first thing that is important is to ascertain, as accurately as we can, what the facts as found by the lower Appellate Court are to which we have to apply the law. The suit is brought by an izarahdar to recover rent from tenants at an enhanced rate. The case made is that the property on which the tenants hold is a Khas Mehal of Government; that the plaintiff and another formerly held an izarah of the Mehal; that then it fell into the Khas possession of Government, and that in about the year 1876 a fresh settlement was made under which the rent of these tenants was enhanced; that subsequently the plaintiff and another again took an izarah, and the plaintiff alleges his title to sue for and recover rents from the tenants at the enhanced rate.

The District Judge, before whom the case came on appeal, says this:—"The Deputy Collector, Baboo T. C. Mitter, who made the re-settlement on behalf of Government, raised the *jummas* to" so and so. "The *jummabundi* was in due course approved by the Board of Revenue, but it is not clear whether the settlement was before or after Bengal Act VIII of 1879 came into force. I shall, for the purposes of this appeal, assume that the settlement was made under Regulation VII of 1822." Then he describes the present appearance of the *jummabundi*, and he

goes on:—"Now, no doubt, if it were necessary in case of a re-settlement of a Khas Mehal to prove that the tenants assented to pay any enhanced rent assessed on them, or it were necessary to prove that a notice, calling on each tenant to attend at the settlement, must be proved to have been served on each individual tenant, it would be exceedingly difficult in the present case to say that the defendant was bound by the settlement. I am not aware, however, of anything either in the Regulation VII of 1822 or in the Bengal Act VIII of 1879, or the present Tenancy Act, which either requires the ryot's assent to the *jumma* imposed, or makes it necessary to prove that a special notice was served on any individual tenant."

Now, we think, the intention of the District Judge must have been to find this: that if it were necessary, under the circumstances of the case, in order to comply with the law, as it existed before Bengal Act VIII of 1879, or the earlier Bengal Act III of 1878, to show either of two things, either the consent of the tenants to the *jummabundi* as recorded, or a notice of enhancement served upon the tenants, to justify the enhancement, then the case of the plaintiff was not made out, for that there was neither assent established nor notice proved. But the District Judge went on to hold that neither of these conditions need be complied with. Taking that to be the finding of fact, and that to be the proposition of law, we have to say whether the proposition has been correctly laid down; and, it appears to us that it has not been correctly laid down. It has been held in a series of cases that one or other of two things must occur in order to make the enhanced rent stated in a *jummabundi* settled under the Regulation which has been referred to, binding upon a tenant. There must be either an assent to that enhancement, or else there must be a compliance with the provisions of the rent law which was in force at the time, Bengal Act VIII of 1869, with regard to enhancement of rent; because it was long settled law, established by a series of decisions, that the rent of a Government Khas Mehal could only be enhanced by the same process as the rent on any private estate.

With regard to that it is not necessary to refer to more than a few cases. There is the well-known case of *D'Silva* v. *Raj*

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Coomar Dutt (1); the case of *Enayetoollah Meah* v. *Nubo Coomar Sircar* (2); and the case of *Reazooddeen Mahomed* v. *McAlpine* (3).

In the first Court reliance was placed upon the case of *Taru Patur* v. *Abinash Chunder Dutt* (4) as an authority for the contrary proposition; but it appears to us that that case is not really an authority for that for which it has been cited. All that was there decided was that the settlement *jummabundi* is a public document, and is admissible in evidence as such under s. 74 of the Evidence Act. It is evident that the question, whether it is admissible in evidence as a public document, and the question whether that which is in it is binding upon tenants without reference to the question of consent or notice, are entirely separate matters, and it is right to notice that even as to that which was actually decided in that case, *viz.*, that the document was a public document, the question is now open to some degree of doubt, because it has been seriously questioned by the late Chief Justice and Mr. Justice Macpherson in the case of *Ram Chunder Sao* v. *Bunsidhur Naik* (5). The passage occurs in p. 743 of the report.

It appears to us, therefore, that if this matter is to be disposed of under the provisions of the law as it was settled, independently of the Bengal Acts of 1878 and 1879, the decision of the lower Appellate Court cannot be supported.

In the first Court, reliance was placed on Bengal Act VIII of 1879. Now, if there be any section in that Act which makes this *jummabundi* binding upon the tenants in question, it is s. 10, which says:—"Every under-tenant and ryot shall be liable to pay the rent recorded as demandable from him under this Act, unless it shall be proved in any suit instituted by such under-tenant or ryot to contest his liability to pay the same that such rent has not been assessed in accordance with the provisions of this Act." Taking that alone, it could not, we think, affect this case, because it only deals with the rent recorded as demandable under the Act, that is to say, in compliance with the provisions

(1) 16 W. R., 153.
(2) 20 W. R., 207.
(3) 22 W. R., 540.
(4) I. L. R., 4 Calc., 79.
(5) I. L. R., 9 Calc., 741.

of ss. 6 and 9, and those sections can only be complied with, if the settlement is actually made in accordance with the terms of the Act. And practically, therefore, it is hardly possible that a settlement could be made which would be affected by s. 10 unless it were substantially made after those clauses came into operation. But reference has further been made to s. 14, which says: "The provisions of this Act shall apply to all settlement proceedings under Regulation VII of 1822, which may have been confirmed after the commencement of Bengal Act III of 1878, or which may hereafter be confirmed or sanctioned by the Revenue authorities from time to time empowered in that behalf by the Lieutenant-Governor, whether such proceedings shall have been commenced before or after the commencement of the said Act." That, no doubt, makes the Act retrospective in this sense, that the effect of settlement proceedings having been commenced before the passing of the Act of 1878, or the Act now in question, is not fatal to the notion of the Act applying. On the other hand, it only makes the Act retrospective; and the provisions of the Act themselves only apply to settlements made in accordance with the terms of the Act, and they cannot therefore have any application to a case in which it has been found by the lower Courts that the settlement was made about two years before the first of the two Acts came into operation. For these reasons we think that this appeal must succeed. The appeal is against the decision of the lower Appellate Court to this extent that the defendant objects to any rent having been allowed to the plaintiff in excess of the old admitted rate of rent, and in accordance with the enhanced rent. The details of the matter can readily be settled between the parties. The amount deposited by the defendant will be taken into account, and a decree made accordingly. In any event the appellant will have his costs of this appeal.

T. A. P. *Appeal allowed.*

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

1889
April 16.

HARO PRIA DABIA (DECREE-HOLDER) *v.* SHAMA CHARAN SEN (JUDGMENT-DEBTOR).*

Insolvency—Insolvent debtors under Civil Procedure Code—Civil Procedure Code, ss. 344, 350, 352, 357, 358—*Debt not in Schedule—Omission to come in and prove debt.*

A judgment-debtor, arrested in execution of a decree, filed his petition and was adjudicated an insolvent, under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend; and her name was not included in the schedule of creditors. The insolvent was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent: *Held* that the discharge of the insolvent did not operate as a discharge of the debt under s. 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property.

Semble.—Under s. 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him, unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them.

SHAMA CHARAN SEN, the judgment-debtor, having been arrested in execution of a decree obtained by Haro Pria Dabia, applied to be declared an insolvent under s. 344 of the Code of Civil Procedure, duly setting forth in his application the names and residence of his creditors, amongst them his decree-holder, Haro Pria Dabia. A day was fixed for hearing the application, and notices were served on Haro Pria and the other creditors. Haro Pria and certain other creditors opposed the application, but eventually, on 22nd April 1887, Shama Charan was declared to be an insolvent and a receiver of his property was appointed. On the same day, in the presence of the opposing creditors or their pleaders, the Court fixed a day, 26th May, for the creditors to

* Appeal from Order No. 45 of 1889, against the order of F. H. Harding, Esq., Judge of Chittagong, dated the 10th of November 1888, reversing the order of Baboo Debender Chunder Mookerjee, Munsiff of that District, dated the 16th of August 1888.

produce evidence of the amount and particulars of their respective claims against the insolvent. Haro Pria Dabia did not appear to prove her claim; but some of the other creditors appeared and proved the amount due to them, and a schedule was framed by the Court of those creditors and their debts proved, a copy of which schedule was stuck up in the Court-house. On the 29th October 1887, no other creditor having applied under s. 353 of the Code of Civil Procedure, the receiver was directed to proceed under s. 356, and to report the result to the Court, and in his report the insolvent was, on 2nd March 1888, discharged under s. 355; the money in the hands of the receiver was disbursed to the scheduled creditors under s. 356, and the surplus was made over to the insolvent. Subsequently, on the 20th March 1888, Haro Pria applied to the Court for execution of the decree obtained by her against Shama Charan previously to the insolvency proceedings by attachment and sale of the insolvent's property.

The Munsiff allowed the application, holding that the discharge of the insolvent was no bar to the execution.

The Judge on appeal reversed that order and held that the execution of the decree could not be allowed. The decree-holder appealed to the High Court.

Munshi *Seraj-ul-Islam* for the appellant.

Baboo *Jogender Chunder Ghose* for the respondent.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

It seems to us clear that the learned District Judge is wrong in the conclusion at which he has arrived. The material facts are shortly as follows:—The appellant obtained a decree against the respondent. The respondent on being arrested on this decree, filed his petition under the insolvency section of the Code of Civil Procedure. The procedure laid down in Chapter XX seems to have been carried out, and, in course of time, the creditors were required to prove their debts. The appellant before us, although she seems to have received notice, did not attend, and, in the result, her name was not included in the schedule. The scheduled creditors, that is to say the persons who proved

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their debts, have been paid and the residue of the property in the hands of the receiver has been paid out to the insolvent. Now this decree-holder seeks to execute her decree against the property of the insolvent.

We have heard argument on behalf of the respondent, and the effect of that argument is shortly this: The learned pleader contends that, as the decree-holder did not attend before the District Judge and give evidence, the whole debt is wiped off, and he argues that his client having got a discharge from his scheduled debts, they are not debts at all.

There can be no doubt that, where a person has got a right, and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment, that there can be no doubt about it. The section of the Code as to discharge, is s. 357. The first portion of that section gives an insolvent a release, so far as arrest and imprisonment are concerned, from his scheduled debts. It then goes on not to give him a discharge in respect even of the scheduled debts, but it goes on to say this: "Subject to the provisions of s. 358, his property, whether previously or subsequently acquired, except the particulars specified in the first proviso to s. 266, and except the property vested in the receiver, shall, by order of the Court, be liable to attachment and sale, until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years from the date of the order of discharge under s. 351 or 355." That is to say, all the property in the hands of the receiver is to be sold, and the proceeds paid to the scheduled creditors; and besides that, his other property is liable to be attached and sold until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years. Probably the effect of that would be to discharge him from the debts to the scheduled creditors entirely, but there is no reference there to any persons whose names are omitted from the schedule. We do not think that the fact that a creditor is invited to prove his claim limits or destroys his rights. There is no doubt that, if he had not been so invited, a creditor would not be affected by s. 357.

It is said that the effect of her omission to come in operates as a decree dismissing her claim. We cannot hold that when we have here a decree-holder, whose decree is admitted, and execution of whose decree is the cause of these insolvency proceedings being taken.

We think it is necessary for us to notice what does appear at first sight to be somewhat anomalous in the provisions of s. 352. As the learned pleader points out, although an insolvent may come into Court seeking to be released from his debts, and although the object of those proceedings is to release him from those debts, if a creditor does not come in and prove his debts, this would prevent an insolvent acquiring the relief that the Code contemplates giving him.

That is unfortunate, but unless the Act takes away existing rights, we cannot say that the rights have ceased to exist. This question is not for us, but for the Legislature to consider. But as Mr. Justice Banerjee pointed out during the argument, it is possible to read s. 352 a little less strictly than is suggested, and to say that an insolvent might come in and prove the debts of the creditors if he wishes to get a discharge from them. That would get rid of the difficulty.

It seems to us that as s. 357 does not give the debtor any right to get his discharge from this debt, we must allow execution to go. In the result we set aside the order of the District Judge, and restore that of the Munsiff. The judgment-creditor is entitled to her costs in the lower Appellate Court and in this Court.

J. V. W.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Gordon.

1889
May 15.

SHEWBARAT KOER (PLAINTIFF) *v.* NIRPAT ROY AND OTHERS (DEFENDANTS).*

Appeal—Superintendence of High Court—Bengal Tenancy Act (VIII of 1885), ss. 104, cl. 2, 105, 106, 108—Rule 33 of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622.

The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents.

THE ryots of one Shewbarat Koer who was the proprietor of mouzah Pupri in Mozufferpore, applied, under s. 104, cl. (2) of the Bengal Tenancy Act, for settlement of their rents; and on the 10th July 1886 the Assistant Settlement Officer passed an *ex parte* order settling such rents. On the 20th November 1886 Shewbarat put in a petition to the Assistant Settlement Officer, stating that the rates of rent, as stated in that officer's "Khettian," did not agree either with the rates the ryots had mentioned, or with the rate as appeared in her Sherista. The Assistant Settlement Officer thereupon directed the petitioner to file a detailed list of her ryots, showing the rental paid by them. This was done on the 2nd December 1886. The Assistant Settlement Officer thereupon passed an order, refusing to re-open the case, the rents having been settled under s. 104 of the Tenancy Act.

Shewbarat appealed against this order to the Special Judge who held that the appellant should have applied to the Assistant Settlement Officer under s. 108 of the Civil Procedure Code, and not under s. 105 of the Bengal Tenancy Act of 1885, and dismissed the appeal.

Shewbarat appealed to the High Court.

Baboo *Tarack Nath Palit*, for the appellant, contended that s. 105 of the Tenancy Act and Rule 33 of the rules made under that Act clearly pointed out the remedy in this case.

* Appeal from Appellate Decree No. 1326 of 1888, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 25th of April 1888, affirming the decree of E. W. Collin, Esq., Settlement Officer of Mozufferpore, dated the 1st of March 1887.

Baboo *Sharoda Charan Mitter*, for the respondents, submitted, that there was no appeal against the order of the Special Judge; the High Court having no jurisdiction to entertain appeals from a Special Judge, save under s. 106 of the Rent Act.

The judgment of the Court (TOTTENHAM and GORDON, JJ.) was as follows:—

It appears to us that in this case the High Court has no jurisdiction either to entertain a second appeal, or to interfere with the order of the District Judge under s. 622 of the Code of Civil Procedure.

The matter in dispute is an entry in the record of rights and of rents settled, made under Chapter X of the Bengal Tenancy Act. The settlement appears to have been made *ex parte*, the Zemindar not having been present. Subsequently the Zemindar objected to the entry, and sought to have it corrected. The Revenue Officer declined to re-open the matter, and the Zemindar appealed against his order (and apparently she had a right to do so) to the District Judge, who is Special Judge under the Tenancy Act. The District Judge held that the only remedy which the Zemindar had was to apply to set aside the *ex parte* order under s. 108 of the Code of Civil Procedure, and he dismissed the appeal. The Zemindar has preferred a second appeal to this Court.

It has been pointed out to us by the respondents' vakil that we have no jurisdiction to entertain this appeal. It appears that the only cases in which the High Court has jurisdiction to entertain appeals from the decisions of a Special Judge are cases under s. 106. Clause 3 of s. 108 of the Rent Act gives the High Court jurisdiction to hear appeals in such cases as if the Special Judge were a Court subordinate to the High Court within the meaning of Chapter XLII of the Code of Civil Procedure. Section 106 provides for the hearing and decision of disputes regarding the record of rights by a Revenue Officer; but that section excludes from a Revenue Officer's consideration disputes regarding the entry of rent settled under the chapter. This entry, therefore, is not such as can be decided or entertained under s. 106; and therefore it appears to us that the High Court has no jurisdiction to hear an appeal from an order of a Special Judge

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in regard to settlement of rent. In respect of that entry, a Special Judge is not a Court subordinate to the High Court; and that being so, we have neither appellate jurisdiction over him, nor any authority under s. 622 of the Code to interfere with his order.

The appeal must, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Gordon.

1889
April 25.

NUNDUN LALL (DECREE-HOLDER) *v.* RAI JOYKISHEN AND OTHERS (JUDGMENT-DEBTORS).*

Limitation Act (1877), *Art.* 179, *para.* (2)—*Appeal against whole decree by one defendant only—Execution of decree—Execution against judgment-debtor who did not appeal.*

A plaintiff obtained on the 14th September 1881 a decree against two defendants, the decree as against the first defendant being one for partition; and as against the second defendant (who had set up a julkar right on the lands claimed to be partitioned, and had contended that partition could not be had, and had obtained a partial decree, but had been ordered to pay partial costs to the plaintiff), being one for costs.

The first defendant alone appealed against this decree, but unsuccessfully, his appeal being dismissed on the 18th January 1884. The decree-holder applied for execution of his decree as against the second defendant for cost in December 1886. *Held* that the application was not barred, for that limitation ran from the 18th January 1884.

NUNDUN LALL, one of the proprietors of mouzah Hosseinpore, which mouzah was, in the year 1881, partitioned by the Collector save and except a portion thereof, measuring 91 bigahs at that time under water. Subsequently the water on this portion dried up, and it became fit for cultivation. Nundun Lall thereupon applied to the Collector for partition of this portion; his application was however rejected on the ground that this land did not form part of the revenue-paying estate of Hosseinpore. Thereupon Nundun Lall brought a regular suit against the Secretary of

* Appeal from Order No. 224 of 1888, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 13th of March 1888, reversing the order of Baboo Grish Chunder Chatterjee, Subordinate Judge of that district, dated the 29th of June 1887.

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State for India in Council to compel partition. The Secretary of State appeared and contended that the land did not form part of Hosseinpore, and could not therefore be partitioned. In this suit one Rai Joykishen intervened, and was made a party defendant thereto: he then set up a julkar right and objected to partition. The suit was on the 14th September 1881 decreed in favour of Nundun Lall, but the Subordinate Judge found that the 91 bigahs in question were sometimes covered with water, and at other times dry land. He therefore made his decree subject to the intervenor's julkar rights during the periods that the land was under water, and directed him to pay a proportionate amount of costs to the plaintiff as he had been unsuccessful in his contention that the land ought not to be partitioned.

Against this decree, the Secretary of State alone appealed, contending that the whole suit should have been dismissed; his appeal was however dismissed by the High Court on the 18th January 1884.

On the 19th July 1886, Nundun Lall applied for execution of his decree; this application was however dismissed, and on the 3rd December 1886 a further application was made by him for execution as against the intervenor defendant for costs. The intervenor objected that the plaintiff's decree had become final as against him on the 14th September 1881, and that therefore the application was barred by limitation.

The Subordinate Judge, before whom the application was made, held relying on the case of *Raghunath Persad* v. *Abdul Hye* (1), that the application was not barred; the appeal by the Secretary of State, if it had been successful, being one which would have led to the dismissal of the whole of the plaintiff's suit, and therefore with loss of his costs obtained against the intervenor defendant; that limitation ran therefore as from the date of the High Court decree of the 18th January 1884.

The intervenor defendant appealed to the District Judge, who on the authority of the cases of *Sangram Singh* v. *Bujharat Singh* (2) and *Hur Pershad Roy* v. *Enayet Hossein* (3) held that

(1) I. L. R., 14 Calc., 26. (2) I. L. R., 4 All., 36.
(3) 2 C. L. R., 471.

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limitation ran as against the intervenor from the 14th September 1881, he not having appealed from the decree of that date.

The decree-holder appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellant, contended that the application was not barred, limitation running from the date of the final decree of the High Court, and cited *Gungamonee Dossee* v. *Shib Sunkar Bhuttacharjee* (1), *Mullick Ahmed Zumma* v. *Mahomed Syed* (2), *Basant Lal* v. *Najmunnissa Bibi* (3).

Moulvi *Mahomed Yusuf*, for the respondents, contended that the application was barred, relying on *Hur Proshad Roy* v. *Enayet Hossein* (4), *Sangram Singh* v. *Bujharat Singh* (5), *Hingan Khan* v. *Ganga Parshad* (6), *Raghunath Pershad* v. *Abdul Hye* (7).

The judgment of the Court (TOTTENHAM and GORDON, JJ.) was as follows :—

The question in this appeal is whether execution of the decree, obtained by the plaintiff-appellant against the respondents, is barred by limitation.

The case is governed by Article 179 of the second schedule of the Limitation Act. The decree was passed in the Court of first instance on the 14th September 1881. The case came up ultimately on second appeal to the High Court, and the High Court's decision, *Secretary of State* v. *Nundun Lall* (8), was passed on the 18th January 1884. Applications for execution were made in July and December 1886. Article 179, clause 2, provides that, where there has been an appeal, the date of the final decree or order of the Appellate Court is the date from which limitation begins to run.

Upon the face of the proceedings, this application would appear not to be barred by limitation; but the lower Appellate Court, upon consideration of various authorities cited by it,—cases in the Calcutta High Court and in that of Allahabad,—has come to the

(1) 3 C. L. R., 430.
(2) I. L. R., 6 Calc., 194.
(3) I. L. R., 6 All., 14.
(4) 2 C. L. R., 471.
(5) I. L. R., 4 All., 36.
(6) I. L. R., 1 All., 293.
(7) I. L. R., 14 Calc., 26.
(8) I. L. R., 10 Calc., 435.

conclusion that, as against the present respondents, execution of the decree is really barred. For it seems that the present respondents were not parties to the appeal from the Subordinate Judge's decision dated the 14th September 1881.

It was contended that, as against them, the appeal preferred by another defendant would not have affected the decree; and therefore as against these respondents the decree was really final when it was allowed to go by them without an appeal.

The suit was one for partition of certain lands. The present respondents intervened in that suit, and were made defendants upon the plea that no partition could take place, because they had julkar rights over the land in question which, they said, was submerged by water. Another party to the suit was the Secretary of State for India. His defence was that the land in question did not belong to the estate of the plaintiff, and he also contended that no partition could be made.

It may be that he intended to contend only that no partition could be made by the Collector under the butwara law; but at any rate he contended that no partition could be made, and alleged that the land did not belong to the plaintiff's estate. The decree was in favour of the plaintiff, and the Secretary of State was the only party who appealed. In the High Court his appeal was practically successful, so far as Government was concerned,—that is, the High Court was of opinion that the land could not be partitioned under the butwara law by the Collector, though it could be partitioned under the Code of Civil Procedure, and the Secretary of State was discharged from the suit with his costs.

We are asked, upon the circumstances of the case, to hold that Article 179 of the schedule of the Limitation Act should not be applied literally to this case, but should be modified in the sense in which it has been modified already in certain cases in the Calcutta and Allahabad High Courts. Those cases are *Hur Proshad Roy* v. *Enayet Hossein* (1), *Sangram Singh* v. *Bujharat Singh* (2), *Hingan Khan* v. *Ganga Pershad* (3), and *Raghunath Pershad* v. *Abdul Hye* (4). On the other hand, we have been referred to cases in this Court and in the High Court of Allahabad

(1) 2 C. L. R., 471.
(2) I. L. R., 4 All., 36.
(3) I. L. R., 1 All., 293.
(4) I. L. R., 14 Calc., 26.

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in which the decisions favour the appellant's contention in the present case. Those cases are *Gungamonee Dassee* v. *Shib Sunkur Bhuttacharjee* (1), *Mullick Ahmed Zumma* v. *Mahomed Syed* (2), and *Basant Lal* v. *Najmunnissa Bibi* (3). In one of these cases, namely *Gungamonee Dassee* v. *Shib Sunkur Bhuttacharjee* (4), the Judges went entirely upon the words of the article, and it seems to us that, in a question of limitation, we ought to abide as strictly as possible by the terms of the law. We should not be disposed to import into the law any further restrictions, as to the rights of parties to sue and to execute their decrees, than the the law itself expressly provides; but we are bound to recognise the fact that the law has been by interpretation, so to say, modified by decisions of this Court and the High Court of Allahabad. If therefore those cases were on all fours with the present one, we should feel bound to follow the decisions, unless we thought it right to refer the matter to a Full Bench. But we think that the present case does not come exactly under the rule laid down in those cases. In those cases in which execution was held to be barred as against parties who were not parties to the appeal; the decision rests expressly upon the ground that the appeal made by one did not and could not affect the decree as against others of the parties concerned in the case. In one case a former Chief Justice, Sir Richard Couch, in delivering judgment, said that the decree being against various parties for various reliefs in reality amounted to several decrees, although embodied in one paper. The rule governing this decision appears to be shortly this, that unless the whole decree was imperilled by the particular appeal which was preferred, the decision in the appeal would not alter the period of limitation in respect of execution of the decree as between other parties to the suit. In the present case we think that the whole decree was imperilled by the Secretary of State's appeal. Had he succeeded fully in maintaining his contention, namely that the land did not belong to the plaintiff's estate, his appeal would have been decreed, and as a matter of course practically the result would have been that the plaintiff's suit would have been dismissed; and he would have been precluded from executing any decree as against

(1) 3 C. L. R., 430.
(2) I. L. R., 6 Calc., 194.
(3) I L. R., 6 All., 14.
(4) 3 C. L R., 430.

the present respondents. We are not bound, and we have no inclination to introduce into the limitation law any restrictions further than those which have been adopted by this Court on previous occasions. We think that the present case does not come within the further restrictions which we have mentioned, and that, upon the face of the proceedings and of the law, the execution in question is not barred.

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That being so, we decree this appeal, setting aside the order of the lower Appellate Court and restoring that of the first Court, with costs.

T. A. P. *Application allowed.*

Before Mr. Justice Tottenham and Mr. Justice Gordon.

MUNGESHUR KUAR AND OTHERS (JUDGMENT-DEBTORS) v. JAMOONA PRASHAD (DECREE-HOLDER).*

1889 *May* 14.

Civil Procedure Code (Act XIV of 1882), s. 244—Claim to attached property—Question to be decided in execution—Liability of property to be sold in execution.

The question whether property is liable to be sold in execution of a decree is one to be determined under s. 244 of the Code of Civil Procedure. *Chowdhry Wahed Ali* v. *Jumace* (1) followed in principle.

ON the 20th April 1887 one Jamoona Prashad obtained a decree for Rs. 3,374 against one Panchu Kuar, the widow of Rajkumar Baboo Kali Pershad Singh. The debt in respect of which the decree was obtained was apparently incurred by the lady for payment of Government revenue and other public demands, but the decree itself was simply a personal decree, and created no charge on her husband's estate which had come into her possession. The decree-holder took out execution, and caused certain shares in the villages of Shampar and Shampur Dearah, which he described as the property of the judgment-debtor, to be attached and advertised for sale. But prior to the date (the 15th September 1887) fixed for the sale Panchu Kuar died, and further

*Appeal from Order No. 46 of 1889, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 28th of January 1889, reversing the order of Baboo Anant Ram Ghose, Subordinate Judge of Tirhoot, dated the 11th of August 1888.

(1) 11 B. L. R., 149; 18 W. R., 185.

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proceedings were accordingly stayed, pending the determination of the question as to who were her representatives for the purpose of executing the decree. Several petitions relating to this question and the execution of the decree were then filed from time to time by some of the daughters of the deceased, as well as by the decree-holder, and ultimately, on the 21st May 1888, one of the daughters, Sundar Kuar, having filed a certificate granted by the Judge of Sarun to her and her sisters, Mungeshur Kuar and Tapessar Kuar, to collect debts due to their mother Panchu Kuar, the Subordinate Judge, before whom the execution proceedings were pending, ordered execution to proceed against the daughters as heiresses and representatives of the deceased judgment-debtor, and the usual notice to be served on them. This order was written in vernacular in the order sheet, but on the reverse an order was written in English, directing execution to proceed against Sundar Kuar alone. The effect of the order recorded in the order sheet was taken to be to bring on the record, for the purpose of executing the decree, all the three daughters of Panchu Kuar, as was prayed in the petition.

On the 16th June 1888 the execution case was struck off the file because the necessary process fees had not been deposited by the decree-holder. But on the 18th June the decree-holder filed a fresh application for execution against the three daughters, and the property referred to above was again advertised for sale on the 15th August 1888. But on the 28th July 1888 the daughters filed a petition objecting to the sale of the property in question on the ground that it belonged to their father, and not to their mother; and that on their mother's death it had devolved upon them as heiresses of their father, and could not therefore be followed in execution of a personal decree against their mother. The Subordinate Judge, assuming apparently that the property belonged to the estate of their father, and was not the *stridhan* of their mother, released it from attachment. The decree-holder then appealed to the District Judge, and the judgment-debtors raised a preliminary objection that their objection before the Subordinate Judge was a claim under s. 278 of the Civil Procedure Code, and that therefore no appeal lay. The learned Judge over-ruled this objection, and held that s. 244 applied;

and, on the merits, he was of opinion that there was no proof on the record that the attached property belonged to the father, and that, as the debt was one incurred for the payment of Government revenue, there was a legal necessity for it, which would bind the father's estate. He accordingly reversed the order of the Subordinate Judge, and directed execution to proceed.

The daughters appealed to the High Court.

Baboo *Hem Chandra Banerjee* and Baboo *Sharoda Churn Mitter*, for the appellants, contended that the case before the Subordinate Judge was in the nature of a claim under s. 278 of the Code and that no appeal lay to the District Judge, relying on the following cases:—*Shankar Dial* v. *Amir Haidar* (1), *Nath Mal Das* v. *Tajamul Husain* (2), *Bahori Lal* v. *Gauri Sahai* (3), *Roop Lall Dass* v. *Bekani Meah* (4), *Kameshwar Pershad* v. *Run Bahadur Singh* (5), *Kanai Lall Khan* v. *Sashi Bhuson Biswas* (6); and further contended that the properties were not liable to be sold, as they had devolved on the appellants as heiresses of their father. *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (7).

Mr. *M. P. Gasper* and Baboo *Rajendro Nath Bose* for the respondent.

The judgment of the Court (TOTTENHAM and GORDON, JJ., after stating the facts, proceeded as follows) :—

It is contended on behalf of the appellants, *firstly*, that the case before the Subordinate Judge was in the nature of a claim under s. 278, Civil Procedure Code, and that therefore no appeal lay to the District Judge; and, *secondly*, that the property is not liable to be sold, because it devolved on the appellants as heiresses of their father and not of their mother.

As regards the first point, we are of opinion that the case is governed by the provisions of ss. 234 and 244, Civil Procedure Code. It is clear from what we have already said that the appellants were brought on the record as representatives of the deceased judgment-debtor, without reference to their liability or non-liability as

(1) I. L. R., 2 All., 752.
(2) I. L. R., 7 All., 36.
(3) I. L. R., 8 All., 626.
(4) I. L. R., 15 Calc., 439.
(5) I. L. R., 12 Calc., 458.
(6) I. L. R., 6 Calc., 776.
(7) I. L. R., 14 Calc., 316.

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such representatives. This was in accordance with para. 1 of s. 234. Then as to their liability, that question has to be ascertained according to the provisions of para. 2 of s. 234 by the Court executing the decree. In the present case the question was whether certain property was liable to be sold in execution, and we think that such a question is a question relating to the execution of the decree between the decree-holder and the appellants, and that consequently it has to be determined under s. 244, Civil Procedure Code. It is strongly urged that as the property came into the hands of the appellants through their father, they are in respect of such property his legal representatives, and not representatives of their mother. Assuming that the property did belong to their father, and this is a disputed question before us, this contention is no doubt true. But after all, it seems to us that this is rather a matter of liability than of representation. The liability of the property to be sold in execution depends upon the determination of the question, whether it was the father's or the mother's, and upon the determination of the same point depends the question whether the appellants are in respect of this property the legal representatives of their father or their mother. But as we have already intimated we think that question falls within the scope of s. 244. It is also contended that the form of the proceedings before the Subordinate Judge shows that he treated the case as one coming under s. 278, and not under s. 244. The petition of the appellants has been read to us, and we find no reference in it to s. 278, and the mere use of the word "claim" by the Subordinate Judge in his judgment is not in our opinion inconsistent with the objection of the appellant's coming under s. 244.

Further, in the view we take we think we are fully supported by authority. In the case of *Chowdhry Wahed Ali* v. *Jumaee* (1) the Privy Council, dissenting from the opinion of a Full Bench of this Court, held that, "when a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to

(1) 11 B. L. R., 149; 18 W. R., 185.

the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of the 11th clause of the Act of 1861."

That was a case under the old Code, and there is this difference between it and the present case, that in that case the decree was against the representative, whereas in this case the representatives have been brought in after decree. But this we think makes no difference. The principle laid down applies to both cases, as the liability of a representative under ss. 234, and 252, Civil Procedure Code, is substantially the same.

The Privy Council decision was followed by this Court in the cases of *Oseemunnissa Khatoon* v. *Ameeroonissa Khatoon* (1) and *Ameerunnissa Khatoon* v. *Mahomed Mozuffer Hossein Chowdhry* (2) [this case is very similar to the present]; by the Allahabad High Court in *Ram Ghulam* v. *Hazaru Kuar* (3), and *Kashi Prasad* v. *Miller* (4); by the Madras High Court in the case of *Kuriyali* v. *Mayen* (5); and by the Bombay High Court in the case of *Nimba Harishet* v. *Sitaram Paraji* (6). The following rulings are relied upon on behalf of the appellants, but we think they are clearly distinguishable from the present case:—*Shankar Dial* v. *Amir Haidar* (7), *Nath Mal Das* v. *Tajamal Hossein* (8), *Bahari Lal* v. *Gauri Sahai* (9), *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (10), *Roop Lall Das* v. *Bekani Meah* (11), *Kameshwar Pershad* v. *Run Bahadur Singh* (12), *Kanai Lall Khan* v. *Soshi Bhuson Biswas* (13).

The cases of *Shankar Dial* v. *Amir Haidar* (7) and *Nath Mal Das* v. *Tajamal Hossein* (8) were both referred to in the case of *Ram Ghulam* v. *Hazaru Kuar* (3), which we have already mentioned, and were distinguished from that case. In both these cases the judgment-debtor objected to the attachment

(1) 20 W. R., 162.
(2) 12 B. L. R., 65; 20 W. R., 280.
(3) I. L. R., 7 All., 547.
(4) I. L. R., 7 All., 733.
(5) I. L. R., 7 Mad., 255.
(6) I. L. R., 9 Bom., 458.
(7) I. L. R., 2 All., 752.
(8) I. L. R., 7 All., 36.
(9) I. L. R., 8 All., 626.
(10) I. L. R., 14 Calc., 316.
(11) I. L. R., 15 Calc., 438.
(12) I. L. R., 12 Calc., 458.
(13) I. L. R., 6 Calc., 777.

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of certain property, on the ground that such property was in his possession as trustee for an endowment and not in his own right; and it was held that the objection, although made by the judgment-debtor, was one properly falling under ss. 278—283 Civil Procedure Code, and that the order passed upon it was not appealable.

But in the present case the appellants claim the property in their own right. The case of *Bahari Lal* v. *Gauri Sahai* (1) is also different. There the judgment-debtor filled two distinct characters, one as representative of the original judgment-debtor, and the other as representative of a third party who had died after preferring a claim; and it was the order passed on this objection which was held to have been passed under s. 281, Civil Procedure Code.

The cases of *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (2) and *Roop Lall Das* v. *Bekani Meah* (3) are clearly not on all fours with the present case. And in the case of *Kanai Lall Khan* v. *Soshi Bhuson Biswas* (4), the High Court held that there were special circumstances which took it out of the general rule established in the cases of *Chowdhry Wahed Ali* v. *Jumaee* (5) and of *Ameerunnissa Khatoon* v. *Mahomed Mozuffer Hossein Chowdhry* (6).

Lastly, there is the case of *Kameshwar Pershad* v. *Run Bahadur Singh* (7), to which our attention has been particularly drawn. But in that case there was no decision that the order passed by the Subordinate Judge did not fall under s. 244. On the contrary, the case appears to have been treated by the Subordinate Judge and the High Court as one coming under s. 244. The real point decided was that Run Bahadur could not be held liable as regards property which had devolved on him as reversionary heir of the husband of the deceased judgment-debtor, or as regards property which he been made over to him by the debtor prior to decree, and that in respect of such property he was not, properly speaking, the representative of the judgment-debtor.

(1) I. L. R., 8 All., 626.
(2) I. L. R., 14 Calc., 316.
(3) I. L. R., 15 Calc., 329.
(4) I. L. R., 6 Calc., 777.
(5) 11 B. L. R., 149; 18 W. R., 185.
(6) 12 B. L. R., 65; 20 W. R., 280.
(7) I. L. R., 12 Calc., 458.

We think therefore on a careful examination of all the reported cases bearing on the matter in dispute, that the weight of authority is in favour of the view we take, *viz.*, that the present case comes under s. 244.

Then as regards the second point argued before us, we think there has been no proper judicial enquiry as to whether the property in dispute belonged to the father or the mother of the appellants.

From an affidavit filed before us it would appear that it was understood before the Subordinate Judge that there was no question as to the property having originally belonged to the husband of the judgment-debtor, and it was for this reason that certain documentary evidence on this point tendered by the appellants was not received. The District Judge merely observes that there is no proof on the record that the properties attached belonged to the father's estate, while before us the matter is disputed. Under these circumstances we think the appellants are entitled to ask for a judicial enquiry, and that the proper course will be to set aside the District Judge's order, and to remand the case to him with directions to receive and consider any evidence that may be adduced by the parties in reference to the matter in dispute, that is, the ownership of the property, and then to re-try the appeal. We may add that we think the question of legal necessity does not arise in the execution of the decree. The decree-holder cannot go behind the decree. Costs will abide the event.

T. A. P. *Case remanded.*

CRIMINAL APPEAL.

Before Mr. Justice Trevelyan and Mr. Justice Hill.

BIKAO KHAN AND OTHERS (APPELLANTS) *v.* THE QUEEN-EMPRESS (RESPONDENT).*

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May 7.

Criminal Procedure Code (Act X of 1882), ss. 161, 172, 211—Statements of witnesses recorded by Police officers investigating under chap. XIV of the Criminal Procedure Code, Right of accused to call for and inspect—Police Diaries.

Statements of witnesses recorded by a Police officer while making an investigation under s. 161 of the Criminal Procedure Code, form no portion of the Police Diaries referred to in s. 172, and an accused person on his trial has a right to call for and inspect such statements and cross-examine the witnesses thereon.

IN this case five persons were committed to the Durbhangah Sessions by the Joint-Magistrate of that district to take their trial on charges framed under ss. 302, 147 and 149 of the Indian Penal Code. On the commencement of the trial in the Sessions Court, the Counsel for the accused applied to the Judge before the opening speech of the Government Pleader, to call for the statements of the witnesses for the prosecution recorded by the investigating Police officer under s. 161 of the Criminal Procedure Code, on the ground that these statements formed no part of the diary referred to in s. 172 of the Code, and that the accused were entitled to see them. Counsel stated that these statements were then in the custody of the District Superintendent of Police who might be subpœnaed to produce them without delay, so that the accused might be in a position to cross-examine the witnesses for the prosecution regarding the statements made by them to the Police. The Sessions Judge disallowed the application, on the ground that under s. 211 of the Criminal Procedure Code, the application for the production of these documents ought to have been made before the committing officer, so as to entitle the accused to call for the papers as of right. The Police officer, who had recorded the statements in question, subsequently brought them into Court of his own motion, and held them in

* Criminal Appeal No. 173 of 1889, against the order passed by A. C. Brett, Esq., Sessions Judge of Durbhangah, dated the 26th February 1889.

his hands during his examination as a witness. The Counsel for the accused then applied to the Judge to compel the production of the papers, then in Court, and to enable him to see them. This application was also refused by the Judge, who eventually convicted four out of five of the accused persons under ss. 304 and 149. As regards the non-production of the statements, the Sessions Judge made the following observations in his judgment:—

"In conclusion I would wish to make some remarks on an incident in the case before even the Government Pleader had commenced his opening address. I was asked by Mr. *Ghose* to order the production, as exhibits in the case, of the statements recorded by the Police under s. 161, Criminal Procedure Code. Mr. *Ghose* said he had with him a copy of an unreported judgment of the Calcutta High Court laying down that he was entitled to call for these documents. The point is a new one. But I am not concerned to discuss the question as to whether these papers can be treated as evidence, and whether, therefore, the defence (or the prosecution for the matter of that) can enforce their production or produce them. The question is not free from difficulty. I disposed of the application on another ground. Under s. 211 of the Criminal Procedure Code, as soon as the committing officer has framed the charge, the accused has to apply for coercive process. I hold that he is not entitled, as a matter of right, to ask the Court of Session for the issue of such process. It may be said that I should, as a matter of equitable discretion, have ordered their production, as this could be obtained without much delay. I do not think so. But even if I am wrong, no harm has been done, for I have read the statements, which I have had translated, and there is practically no difference between what the persons examined stated, and what the witnesses have deposed before both Courts. The papers were, in fact, in Court on the second day of the trial; and, indeed, Exhibit S. B. is an integral portion of them. I therefore hold (1) that the defence was not entitled to enforce their production; (2) that it was a proper exercise of my discretion to refuse to order their production; (3) that my refusal has in no way damnified the defence."

The prisoners appealed to the High Court against the conviction.

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Mr. *Woodroffe*, Mr. *M. M. Ghose*, Mr. *M. P. Gasper* and Baboo *Saroda Churn Mitter* for the appellants.

The *Standing Counsel* (Mr. *Philips*) and Baboo *Ram Churn Mitter* for the Crown.

Mr. *Woodroffe* contended, among other matters, that there ought at least to be a new trial as the Judge had improperly disallowed Mr. *Ghose's* application, calling for the statements, and had further prevented him from reading them when they were actually before the Court. Statements recorded under s. 161 are not privileged, and form no portion of the diary referred to in s. 172. The latter is to contain a record of the proceedings of the Police and their movements, together with expressions of opinions and private matters which the Legislature probably intended should not be placed at the disposal of the parties. But it could never have been intended that the accused should be debarred from calling for the statements made by the witnesses for purposes of cross-examination, especially as under the new Code a witness is liable to be prosecuted for perjury for false statements made before the Police. This question was fully argued recently before Mitter and Macpherson, JJ., in the case of *Mahomed Ali Hadji* v. *The Queen-Empress** (Criminal Motion 422 of 1888 decided on the 30th January 1889), and those learned Judges have held that the accused were entitled to have these statements produced, and that it was an error on the part of the Magistrate not

* *Before Mr. Justice Mitter and Mr. Justice W. Macpherson.*

IN THE MATTER OF MAHOMED ALI HADJI AND OTHERS (PETITIONERS) *v.* THE QUEEN-EMPRESS (OPPOSITE-PARTY).

Mr. *M. M. Ghose* and Baboo *Jogendro Nath Bose* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The facts of the case are sufficiently stated in the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows:—

MITTER, J.—The petitioners, Mahomed Ali Hadji, Nabi Baksh, and Bazra Sonar, were charged in the Deputy Magistrate's Court of Gaibanda with being members of an unlawful assembly, on the 25th day of June last, armed with deadly weapons, and that by such unlawful assembly, force or violence was used in the prosecution of a common object: the common object being described in the charge sheet as the forcible dispossession of Budrunnissa's party from the Sultanpore cutcherry. That is, they were charged

to have compelled their production. The Police authorities themselves have recognised the distinction contended for, and have laid down in Circular No. 16, of the 28th July 1883, to all District Superintendents of Police, that statements recorded under s. 161, Criminal Procedure Code, are different from the diary.

[TREVELYAN, J.—The Police circular need not be referred to in order to explain the law. It is no authority. But we are satisfied that the law is clear on the subject, and that you were entitled to call for the statements, provided you asked for them in proper time.]

The Sessions Judge is quite mistaken in supposing that s. 211 of the Criminal Procedure Code has any application. Even if that section applied, as a matter of sound discretion, the Judge ought to have granted Mr. *Ghose's* application.

under the first count with rioting and being armed with deadly weapons under s. 148 of the Indian Penal Code. In the second count, they were charged under s. 326, coupled with s. 149, of the Indian Penal Code, it being stated that, in the prosecution of the common object of that unlawful assembly, grievous hurt was inflicted by some of the members of that assembly. The facts, as found by the Deputy Magistrate, are as follows :—One Kheraj Ali Chowdhry was the owner of Sultanpore estate, and had his family dwelling-house in the village of that name. He had also a cutcherry-baree in it. He died some time in the month of Kartick 1294, and the death of his widow Asmutunnissa followed within a few days. Moazum Hossein Chowdhry of Shibganj, a brother of Asmutunnissa, claimed the whole estate left by Kheraj Ali, on the ground that it had been transferred by Kheraj Ali in his lifetime to his wife Asmutunnissa. Upon this allegation, Moazum Hossein had obtained a certificate under Act XXVII of 1860 to collect the debts due to the estate of Asmutunnissa. With the assistance of two leading ryots in the village of Sultanpore, *viz.*, Kedar Ali Mir, a witness examined on behalf of the prosecution, and Noimuddeen Pundit, Moazum Hossein succeeded in obtaining possession of Sultanpore with the cutcherry-baree in it. But in Bysack last, these two men went over to the party of one Budrunnissa. Budrunnissa is the paternal aunt of Kheraj Ali. She and others denied the allegation of transfer of his whole estate by Kheraj Ali to his wife, and claimed either the whole or a portion of it as heirs-at-law of Kheraj Ali. As usual, in these cases, both parties struggled to maintain possession by force. The Deputy Magistrate found that the possession by Moazum Hossein of the cutcherry at Sultanpore, with the assistance of the two leading ryots mentioned above, was main-

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[TREVELYAN, J.—As at present advised we are with you on this point.]

Mr. *Woodroffe* then proceeded to argue the case on its merits.

The *Standing Counsel*, in support of the conviction, conceded that the accused probably had a right to call for the papers, and to look at them, but they were not prejudiced as the Judge had himself looked at them, and given the accused the full benefit of their contents.

tained up to Bysack last, but on these two men going over to the other side that possession was lost and Budrunnissa's servants occupied the cutcherry-baree from that time and were in occupation of it at the time when the riot took place at the cutcherry-baree; that on the date mentioned in the charge, *viz.*, on the 25th day of June last, a body of latials headed by the petitioners came on behalf of Moazum Hossein to the cutcherry-baree, attacked the men occupying it, and inflicted injuries with spears on four persons, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, servants of Budrunnissa. This attack wa smade in the latter end of the night on that date, but Budrunnissa's party soon collected men in sufficient numbers to repel the attack, and the assailants were pursued up to another cutcherry-baree in a village called Mujlispore, distant about three or four miles from Sultanpore, in which a cutcherry-baree had been erected by Moazum Hossein sometime about the month of Bysack, when his people were ejected from the cutcherry-baree at Sultanpore.

Upon these facts, found by the Deputy Magistrate, the petitioners before us have been convicted of the offence of rioting, and of the offence of committing simple hurt, it being not proved that the injuries inflicted amounted to grievous hurt. It may be mentioned here that some of the men forming the attacking party were also wounded during the riot, and one of them has since died in hospital.

Each of these petitioners has been sentenced to two years' rigorous imprisonment. The witnesses for the prosecution were examined on the 5th and 6th of July last. On this last-mentioned date, the two charges mentioned above were framed against the petitioners. The witnesses were fully cross-examined by the pleader engaged on behalf of the petitioners before these charges were framed. The case was then fixed for trial on the 17th of July, but it was postponed in consequence of Counsel from Calcutta, who was engaged on behalf of the petitioners, not arriving on that date. It was taken up on the following day, *viz.*, on the 18th. In the meantime, certain witnesses had been cited by the petitioners to establish their defence, but none of the witnesses for the prosecution had been cited to be re-called.

On the 18th of July, when the case was taken up, the Counsel for the petitioners put in the witness-box the Inspector of Police of Sadullapore,

The judgment of the High Court (TREVELYAN and HILL, JJ.) was as follows :—

In this case the prisoners have been convicted by the Sessions Judge of Durbhangah, agreeing with one of the assessors, of offences under s. 304, read with s. 149, and under s. 147 of the Penal Code.

They have appealed to this Court, and Counsel on their behalf has urged that the evidence does not justify their conviction, and that even if the evidence, as given, would justify a conviction, the accused have been so prejudiced by the action of the Judge in excluding evidence which ought to have been admitted, that they are entitled to a new trial.

who was conducting the prosecution in this case, and it appears from the drift of the examination that the Counsel intended to establish that four of the witnesses examined on behalf of the prosecution, *viz.*, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, who had received injuries in the course of the riot, had given evidence before the Police officer who investigated the case under s. 161 of the Criminal Procedure Code, not agreeing with the version of the story told by them at the trial.

It appears from the examination of the aforesaid Inspector that these four men had at first denied that they were sleeping in the cutcherry on the night when the riot took place, but that they subsequently admitted that fact on being further questioned by the investigating Police officer. Upon some points the Inspector, from his memory, could not answer the questions put to him by the Counsel for the defence regarding the statements made by these witnesses. Thereupon an oral application was made by the Counsel for the production of the diaries kept by the investigating officer. A note made by the Court of this application, and the order made thereupon is to the following effect :—"Mr. *Gregory* asks the Court to require the Inspector to produce the diaries, and as I find the witness has admitted almost everything required by the defence, and because Police diaries cannot be used as evidence, nor can they be called for by the accused, the Court declines to call for the diaries at the instance of the Counsel for the defence." This evidence of the Inspector was taken on the 18th July. There were some more witnesses examined on behalf of the defence on the next day, and the trial was concluded, but judgment was reserved and not delivered till the 27th of July. On the 20th of July, we find that an application was made on behalf of the petitioner before us, embodying the purport of the oral application made by Counsel on the 18th of July referred to above. In this application, it was stated that the four witnesses, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch, had made statements to the Police Inspector contrary to those which

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We consider that the Judge has wrongly excluded evidence which he ought to have admitted.

A Police officer in this case had, under the provisions of s. 161 of the Criminal Procedure Code, examined persons who were afterwards called as witnesses.

At the Sessions trial this Police officer was in Court, and had with him the statements which he had taken down.

There can be no doubt that these statements would be admissible in evidence. They are not a portion of the diary, and are not protected by any enactment.

had been made by them in their depositions in Court, and that to a certain extent this fact had been established by the evidence of the Police Inspector; but it was not established to the full extent, and therefore they prayed that that portion of the Police diary in which the statements of these four witnesses had been recorded be sent for, and then after inspection of the said portion of the diaries, if it be considered proper to send for any witnesses, such witnesses might be sent for. An appeal was preferred to the Sessions Judge against the conviction and sentence passed by the Deputy Magistrate. In the petition of appeal, no point was made regarding the refusal of the Deputy Magistrate to send for the Police diary mentioned above, but it has been stated to us by Mr. *Gregory*, who appeared both in the Deputy Magistrate's Court as well as in the Court of the Sessions Judge, that this point was argued by him before the Sessions Judge. We do not find that it is dealt with by the Sessions Judge in the judgment which was recorded by him. This, however, is the principal point which has been taken before us in support of the rule which was issued in this case. In fact it forms the first and second grounds taken in the petition presented to this Court. The first ground is to the following effect:—"That the Deputy Magistrate ought to have compelled the production of the statements of the witnesses for the prosecution as recorded by the Sub-Inspector and the Inspector of Police under s. 161 of the Criminal Procedure Code. Such statements are not governed by the provisions of s. 172 of the Criminal Procedure Code, and were therefore not privileged. These statements were most material, and their production would have enabled your petitioner's Counsel to show that the witnesses were not reliable. Your petitioners' Counsel had strongly complained before the Appellate Court of the non-production of the said statements." The second ground is:—"That the petition, presented by your petitioners, clearly shows that the papers wanted were the statements of the witnesses and not the diaries, though the word 'diaries' was inaccurately used, because the Inspector had used the expression. The Deputy Magistrate ought to have called for those papers." The first paragraph, it seems to us, does not

The Judge refused to allow them to be used on the ground that the accused had not asked the committing Magistrate to allow them to be produced.

It appears from an affidavit, which has been used before us, that when the Sub-Inspector, who made the investigation, was being cross-examined, the Counsel for the accused asked the Judge to hand up the statements taken down by the witness to enable him to answer questions as to statements made by some of the persons who were called as witnesses for the prosecution. This the Judge refused to do.

accurately state what happened; the first paragraph says that an application was made for the statements of the witnesses for the prosecution, as recorded by the Inspector and Sub-Inspector of Police, under s. 161 of the Criminal Procedure Code. The fact is that what was wanted was not the statements of all the witnesses, but only the statements of the four mentioned above, *viz.*, Hyat Mahomed, Boli Sheikh, Kader, and Dalch. It may be conceded that the document that was asked to be produced was misdescribed in the petition, and also in the Judge's notes as "diaries." It appears that, from ss. 161 and 172 of the Criminal Procedure Code, what was wanted was not properly described as "diaries." Under s. 172, a diary is a privileged document, and neither of the parties has any right to ask for its production; but although in the application and in the note the document in question is described as a diary, it is sufficiently clear that what was wanted was the production of the statements, which in this case seem to have been reduced to writing, of the four witnesses mentioned above, which statements were taken by the investigating Police officer under s. 161 of the Criminal Procedure Code. It may also be conceded in favour of the petitioners that these statements could have been, under certain conditions, used as evidence in the case. For instance, they might have been used for the purpose of contradicting the witnesses mentioned above, or of contradicting the Inspector of Police under s. 145 of the Evidence Act. That being so, the Counsel for the petitioner was entitled to have an order from the Deputy Magistrate for the production of these statements. It is an error on his part to have refused the application, but it does not follow that because there is this error his judgment should be set aside. On the other hand, both under s. 537 of the Criminal Procedure Code as well as s. 167 of the Evidence Act, we cannot reverse or alter a judgment unless we are satisfied that the error in question has caused a failure of justice. Mr. *Ghose* was asked to point out in what way this error has caused a failure of justice, and he contended that, if the statements had been sent for, the petitioner would have been in a position to establish that the cutcherry-baree in Sultanpore was really in

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We think that the Judge ought to have permitted Counsel to put the statements to the witness. There is no doubt that an accused person is entitled to call as his witness any person who is in Court, whether he has summoned him or not (see s. 291 of the Criminal Procedure Code), and there is, we think, equally no doubt that an accused may, so far as the law of evidence permits him to do so, make use of, as evidence, any document which is in Court at the trial. Before, however, we could order a new trial on

the possession of Moazum Hossein, and not in the possession of Budrunnissa ; and if it was established that the cutcherry was in the possession of Moazum Hossein, then the charge would have entirely fallen to the ground because the common object of the unlawful assembly stated in that document was the forcible taking possession of the cutcherry. Now we have referred to the judgment of the Deputy Magistrate, and we are of opinion that it is not based as regards the question of possession upon any part of the depositions of the four witnesses mentioned above, *viz.*, Hyat Mahomed, Boli Sheikh, Kedar, and Dalch. His finding upon the question of possession is mainly based, *firstly*, on the evidence of one of the two leading ryots, *viz.*, Kedar Ali, and, *secondly*, upon the circumstance that, about the time that Moazum Hossein's servants were alleged to have been ejected from the cutcherry of Sultanpore, they erected another cutcherry-baree in Mujlispore, within three or four miles from Sultanpore. With reference to this second ground, the Deputy Magistrate says that Mujlispore was a very small village, and if Moazum Hossein had been in possession of the cutcherry at Sultanpore, there would have been no necessity for erecting a new cutcherry at Mujlispore. In fact the judgment of the Deputy Magistrate was not founded on the evidence of the four witnesses, whose statements before the investgating Police officer was asked to be sent for. We are therefore not satisfied that the omission to send for these documents has in any way caused a failure of justice.

There was only one other point argued before us, *viz.*, that the sentence in this case is too severe. We have considered this point, and we are of opinion that the sentence that has been passed upon the petitioners, having regard to the nature of the offence established against them, is not too severe. We therefore discharge the rule.

MACPHERSON, J.—I agree. I further think that the statements called for would have been of no practical use to the petitioners unless they were in a position to summon the witnesses for the prosecution, and cross-examine them with reference to statements which they had made to the Police.

The statements were called for at a very late stage, when the petitioners were not entitled to have the prosecution witnesses summoned for the purpose of cross-examination.

this ground, we would have to be satisfied that injustice had been done to the accused by the exclusion of this evidence.

If it had appeared that there was a material difference between the statements made by the witnesses to the Sub-Inspector, and their statements made in Court, it would have been difficult to say that the accused had not been prejudiced by the Judge's decision on this question.

The Judge says that he has read the statements, and that there is practically no difference between what the persons examined stated and what the witnesses have deposed before both Courts. We see no reason to doubt the correctness of the Judge's statement, and if the legal advisers of the accused had seen any real ground for disputing it, they would have endeavoured to obtain the production of these statements, so that they might have been considered at the hearing of the appeal.

Taking all the circumstances into consideration, we do not think that the omission of the Judge to admit this evidence would justify us in ordering a new trial. On the mere speculation that these statements would disagree, and in face of the Judge's statement that they do not materially disagree, we could not order a new trial.

[Their Lordships then proceeded to determine the case on its merits, and ended in upholding the conviction and reducing some of the sentences.]

H. T. H. *Conviction upheld.*

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice Beverley.

KRISTO RAMANI DASSEE (APPELLANT) *v.* KEDAR NATH CHAKRAVARTI AND ANOTHER (RESPONDENTS).*

1889 *January* 16.

Set-off—Civil Procedure Code (Act XIV of 1882), *ss.* 233, 243, 246—*Execution of assigned decree—Set-off against assigned decree partly executed.*

A. B. had obtained a decree against *K.* and *T.* After the decree had been partially satisfied, *A. B.* assigned it to *D.* Prior to the date of the assignment, *K.* and *T.* had instituted a suit against *A. B.* and *D.*, and ultimately obtained a decree against both of them.

* Appeal from Order No. 381 against the order of Baboo Gopal Chunder Bose, Subordinate Judge of Bhagulpore, dated the 25th August 1888.

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Held, that *K.* and *T.* were entitled to set-off their decree against the unexecuted portion of the decree which had been assigned to *D.*

THE appellant, the respondents, and one Anisul Barkat appear to have been co-sharers in a certain putni-tenure. On the 13th June 1883, Anisul Barkat obtained a decree for rent for about Rs. 9,000 against the respondents Kedar Nath Chakravarti and Troylucko Nath Chakravarti. After the decree had been partially satisfied, on the 29th June 1886, Anisul Barkat assigned it to the appellant Kristo Ramani Dassee, a sum of Rs. 5,118-12-3 being then due under it. Meanwhile, on the 3rd February 1885, that is, prior to the date of the assignment, the respondents Kedar Nath and Troylucko Nath instituted a suit against both Anisul Barkat and Kristo Ramani Dassee, the assignor and assignee, for possession and mesne profits in respect of another share in the same putni, and obtained a decree against both of them on the 23rd March 1887.

Under this decree, on the 16th July 1888, mesne profits, as against the assignor Anisul Barkat, were assessed at Rs. 5,187-13-8. While the respondents' suit was pending, Kristo Ramani attempted to execute the decree which had been assigned to her, but was resisted by them. Ultimately she established her right to execute the decree, and also obtained a decree for costs in those proceedings amounting to Rs. 60-3-3. Kristo Ramani thus held decrees against the respondents, Kedar Nath and Troylucko Nath, for an aggregate sum of Rs. 5,178-15-6, in execution of which she attached the same share in the putni, in respect of which they had obtained a decree, and the property was advertized for sale on the 16th July 1888. On that date, as already stated, the respondents had obtained their decree for mesne profits, amounting to Rs. 5,187-13-8, as against Anisul Barkat. As this decree had been obtained in a different Court, the respondents applied for a postponement of the sale in order to enable them to have their decree transferred to the Court which was executing Kristo Ramani's decree. That was done, and the respondents having pleaded their decree by way of set-off, the Lower Court allowed the plea.

From this order Kristo Ramani appealed to the High Court.

Mr. *J. T. Woodroffe*, Baboo *Troylucko Nath Mitter*, and Baboo *Saroda Charan Mitter* for the appellant.

Baboo *Navadip Chunder Roy* for the respondents.

The judgment of the Court (PIGOT and BEVERLEY, JJ., after setting out the facts, proceeded as follows):—

The question raised is shortly this: Whether or not the decree obtained by the respondents against the assignor in a suit which was pending at the date of the assignment, and which had ripened into a decree before the assigned decree was fully executed, can be set-off against the unexecuted portion of the assigned decree. The question for decision depends upon the construction of three sections of the Civil Procedure Code: ss. 246, 243 and 233. By s. 246 a set-off of one decree as against another is allowed. By explanation 2 of that section, it is allowed "where either party is an assignee of one of the decrees, and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself." It was for some time a subject of controversy in this Court, whether in the case of decrees, both of which were in existence but not yet set-off one against the other, upon the assignment of one of them, the right to set-off still subsisted as against the assignee; and after some controversy that question was finally decided in favour of the right to set-off. The case now before us opens a further question, inasmuch as at the date of the assignment of the decree now held by the appellant, the decree held by the respondents had not been made, although their suit had been filed. Section 243 provides that, "if a suit be pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may (if it think fit) stay execution of the decree, either absolutely or on such terms as it thinks fit, until the pending suit has been decided. In s. 233, it is enacted that "every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder." When the appellant took an assignment of this decree, she must have known perfectly well (for it is admitted that she had full notice) of the existence of the suit against herself and her assignor, her co-sharer in the putni.

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A right to set-off the amount of one decree against another was repeatedly referred to, as an equity affecting the latter decree, in the decisions of this Court prior to the Code of 1877, which for the first time enacted section 233. In whatever mode that equitable right could be made to operate as against the holder of the decree, we think it must be allowed to operate against his assignee with notice of the existence of the pending suit. It is clear that, apart from the assignment, the right of set-off as to the unexecuted part of the first decree would exist in the present case under s. 246 against the assignor; and for the reason just stated it must equally exist against the assignee.

We therefore dismiss both appeals with costs. We think that we ought not to be illiberal in assessing the costs in this case, which is an exceedingly oppressive attempt on the part of the appellant; and for that reason, and the importance of the matter, we allow five gold mohurs as the hearing fee in each appeal.

C. D. C. : *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

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April 16.

KHATU BIBI (DEFENDANT No. 2) *v.* MADHURAM BARSICK (PLAINTIFF).*

Transfer of Property Act (IV of 1882), *s.* 54—*Transfer of immoveable property by unregistered deed—Deed of which registration is optional—Suit by purchaser for possession when vendor is out of possession.*

Section 54 of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property of less than Rs. 100 should be made only by one of the modes there stated, so as to confer a valid title.

Where the plaintiff bought from the heirs of *M.*, who were out of possession, their right title and interest in certain immoveable property, and such property was conveyed to the plaintiff by an unregistered deed, registration of the deed (the property being of value of less than Rs. 100) not being compulsory: *Held*, in a suit to recover the property from persons in possession without title, that the sale conferred a valid title on

* Appeal from Appellate Decree No. 958 of 1888, against the decree of W. H. M. Gun, Esq., Judge of Noakhali, dated the 13th of February 1888, modifying the decree of Baboo Srigopal Chatterjee, Munsiff of Sundip, dated the 27th of June 1887.

the plaintiff, though not made by registered deed or by delivery of the property.

The *dictum* of Garth, C.J., in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1) dissented from.

THE facts necessary for the purpose of this report were that the plaintiff sought to recover a share of certain land, after establishment of his *howla* title to it; that the *howla* originally belonged to two persons, Pan Gazi and Mahabat Ali, who died in 1283 (1876) and 1284 (1877), respectively, leaving as their heirs the defendants Nos. 2 to 8; that Khatu Bibi, the defendant No. 2, was the widow of Pan Gazi, and she claimed the whole of the property in dispute, but the lower Appellate Court found that she was entitled only to an eight-anna share which her husband had conveyed to her in lieu of dower by a deed of sale of 30th Assin 1283 (15th October 1876); that the defendants Nos. 1 and 2 had taken possession of the whole of the property after dispossessing the other defendants; and that the other defendants or some of them who had acquired the interest of the others had, while out of possession, sold the remaining eight-anna share (that of Mahabat Ali, whose heirs they were,) to the plaintiff by a deed of sale, dated 6th Choitro 1291 (18th March 1885). This deed of sale was unregistered, the registration of it, as the value of the property was less than Rs. 100, being optional.

The defendants Nos. 1 and 2 were the only defendants who really defended the suit, and by the findings of the lower Courts the defendant No. 2, Khatu Bibi, was alone adversely affected. She consequently appealed to the High Court from the decree of the lower Appellate Court, which gave the plaintiff an eight-anna share of the property.

Baboo *Jaggat Chunder Banerjee* and Baboo *Debendro Mohun Sen* for the appellant.

Baboo *Okhil Chunder Sen* for the respondent.

For the appellant s. 54 of the Transfer of Property Act was referred to, as showing that the transfer of immoveable property must be made either by a registered instrument or by

(1) I. L. R., 8 Calc., 597, at p. 612.

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delivery of possession; and that under an unregistered deed, although registration was not compulsory, the plaintiff could not obtain a valid title, and the dictum of Garth, C. J., in the case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1) was referred to in support of this contention.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

The District Judge in appeal has found that plaintiff has bought the right title and interest which Mahabat Ali had in an eight-anna share of a certain *howla*. This was conveyed to the plaintiff by an unregistered document, registration not being compulsory within the terms of s. 17 of the Registration Act, because the value of the property conveyed was less than Rs. 100. The vendors were out of possession when the sale took place, and the plaintiff seeks to obtain possession on this title as against certain defendants who have been found to have no title at all.

The question raised before us on second appeal is whether, having regard to the terms of s. 54, clause 3, of the Transfer of Property Act, the sale to the plaintiff has conferred any valid title, inasmuch as it has not been completed either by a registered document or by delivery of possession of the property sold. As an authority for this, we have been referred to some observations made by the late Chief Justice, Sir R. Garth, in the case of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1). These observations were only *obiter dicta* without any argument at the bar, and are therefore not binding on us, but, as coming from so high an authority, are entitled to every respect and consideration.

The conveyance on which the plaintiff's title depends is one, registration of which, under s. 18 of the Registration Act 1877, is not compulsory, but optional with the parties.

There is no question, in this case, of competition between this document and another executed by the same person and duly registered, so that s. 50 of the Registration Act does not apply. The conveyance therefore is a valid document, receivable in evidence of the transaction affecting the immoveable property

(1) I. L. R., 8 Calc., 597, at p. 612.

with which it professes to deal, and is not affected by the Registration Act. It would convey a good title under which the vendee could sue to obtain the rights conveyed to him as against trespassers who may have unlawfully dispossessed his vendor unless such title be restricted by some special law.

The Transfer of Property Act, s. 54, defines a sale of immoveable property, and declares how it may be made. A sale is defined to be "a transfer of ownership in exchange for a price paid or promised, or part paid and part promised."

In declaring how transfers may be made, the section draws a distinction between transfers of tangible immoveable property of the value of Rs. 100 and upwards, and of the value of less than Rs. 100. Of the former it declares that transfer "can be made only by a registered instrument;" of the latter it declares that "transfer may be made either by a registered instrument or by delivery of the property." But the law does not state that such transfer can be made only by one of these means. Nor, is it anywhere provided that a person out of possession shall not sell to another his right title and interest in any property, nor is it declared that in such a case the transfer can be made only through a registered instrument. The actual rights may, in our opinion, be conveyed through an unregistered instrument, for that, by the Registration Act, is receivable in evidence of the transaction, because the value of the property conveyed is less than Rs. 100. It surely could never have been intended that one who has been found to have no title as the defendant appellant, should on such a plea succeed as against the purchaser of the right title and interest of the lawful owner who has been unlawfully put out of possession. Such an owner cannot complete the transfer of his property by delivery of possession. Was it necessary that the conveyance should have been by a registered instrument so as to confer a valid title? We think not.

Section 18 of the Registration Act expressly declares that an instrument, such as that before us, *may* be registered as distinguished from instruments specified in s. 17, which the law declares *shall* be registered.

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Section 49 declares that "no document required by s. 17 to be registered shall affect any immoveable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered under the provisions of the Act," but there is no prohibition in respect to other documents. It is only when a registered document comes into competition with an unregistered document of the same nature, and relating to the same property, that the former takes effect, although registration of the latter may have been optional and not compulsory. We apprehend that it could not have been the intention of the Legislature to allow the law, as expressed in the Registration Act, to remain unrepealed and indirectly to nullify the effect that it has always received by the enactment of s. 54 of the Transfer of Property Act, which has been quoted.

We are not inclined to adopt such a rigid construction of the law as that pressed on us and held by the late Chief Justice, Sir R. Garth, when it would seem that another construction would reconcile the Registration Act with the Transfer of Property Act, so as to prevent what, in this case, would amount to a denial of justice. If such an alteration of the law, amounting to a confiscation of previously existing rights, were contemplated, we apprehend that it would have been expressed in other and clearer terms.

We are therefore of opinion that s. 54, clause 3, of the Transfer of Property Act is not exhaustive or imperative in requiring that the transfer of immoveable property sold, and of small value, should be made only under one of these conditions so as to confer a valid title. In clause (ii) the law is clear that a transfer of immoveable property of a particular description *can be made* only by a registered instrument, but clause 3 uses the expression *may be made*. It does not declare that it may be made *only* and thus repeat an expression first used in the preceding clause. We therefore hold that, on his unregistered conveyance, the plaintiff is entitled to obtain possession of an eight-anna share, and we dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

PRIVY COUNCIL.

P. C.*
1888
November 21
December 19.

KALI DUTT JHA AND OTHERS (DEFENDANTS) *v.* ABDUL ALI AND ANOTHER (PLAINTIFFS).*

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Guardian—Power of Guardians—Sale by guardian of property to which ward's title was in dispute, and for the benefit of the latter.

By the Mahomedan law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was.

Although the sale deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it was one beneficial to them.

APPEAL from a decree (8th February 1884) of the High Court, reversing a decree (17th January 1882) of the Subordinate Judge of Mozufferpore.

The two plaintiffs, now respondents, were the son and daughter of Bibi Udulunnissa, who died on the 26th October 1861, leaving them, with her husband, their father Sheikh Riazuddin Hossein, her heirs. The share of the latter in her estate was one-fourth, and the residue formed the children's shares. Riazuddin, who in his wife's lifetime had been managing her estate, continued to manage it as to the children's interests after her death, the son being little more than two years old, and the daughter about one year, and he being their natural guardian according to Mahomedan law.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, and MR. STEPHEN WOULFE FLANAGAN.

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The plaintiffs, of whom the first attained full age on 3rd May 1880, and the second was still a minor suing by her maternal grandmother, claimed to obtain possession of a one-anna share in a taluk named Wari in Zillah Durbhunga, and to have set aside, as to the one-anna share, a sale made by their father Riazuddin (the kobala or sale deed having been dated 7th May 1862), of two annas out of nine annas of the whole sixteen of taluk Wari, for Rs. 6,235 (the price of the one-anna share being half that amount). The sale was to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as share-holding proprietors and inhabitants of taluk Wari. They were defendants in this suit, their representatives and survivors being now appellants.

Taluk Wari, resumed as invalid lakhiraj in 1840, had from that time down to its final settlement by the Collector in 1862, been the subject of disputes, as to what persons were entitled to settlement; whether entitled as *maliks*, among whom were the predecessors of the Hindu respondents, the owners of neighbouring mouzahs, or entitled as *menhaidars* (persons holding at a reduced assessment), among whom were certain Mahomedans.

The taluk, including a share in it bought by Udulunnissa amounting to four-and-a-half annas (she having purchased jointly with her brother nine annas, and Riazuddin her husband holding benami for her), became the subject of various dealings. These are set forth in their Lordships' judgment, which also contains all the relevant facts relating to the deed of sale of 7th May 1862 executed by Riazuddin.

The plaint stated that the consideration of the sale deed, so far as regarded the one-anna share, was Rs. 3,117, which sum was alleged to have been appropriated by Riazuddin to his own use. The ground on which the sale was impeached was that Riazuddin had not obtained a certificate from the Civil Court to act as guardian, and that the sale was not made to pay off any debt, as alleged in the deed of sale, or for the plaintiffs' benefit.

Besides other grounds of defence, the following was relied upon, *viz.*, that the defendants or their predecessors in estate had acquired by purchase in 1856, from one Sufdar Hossein,

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the right to a certain share in taluk Wari; and by virtue of that right, and also of a right of pre-emption by reason of vicinage, as regarded other interests sold by Sufdar Hossein to the plaintiffs' great-grandfather Jaffer Ali in 1856 and 1857, had instituted five several suits, in which they, the defendants, claimed nine annas of the taluk, and were also claiming in a resumption suit, then, and since 1840, pending before the Collector of the District, the right to settlement with them of the interest which they had so purchased; that the sale to them by the plaintiffs' father was made for the purpose of putting an end to litigation, and that the consideration was applied to paying off a debt due from the plaintiffs', or their mother's estate, to a banking firm styled "Babu Gopal Das and Babu Bunsi Lal Das." And they further alleged that the suit was brought by the plaintiffs in collusion with their father, and contended that, even assuming that the plaintiffs' father had no right to sell their interest, his own interest in taluk Wari equalled or exceeded that which he had professed to sell, and that the plaintiffs had no title to what they claimed.

The issues raised the following questions, *viz.*: (1) whether the plaintiffs' father could sell the disputed property without having obtained a guardianship certificate from the District Judge; (2) whether the sale deed of 7th May 1862 was valid, either on account of benefit to the plaintiffs or because the father's share in his wife's property covered the interest sold; (3) whether the plaintiffs were benefited by the purchase money.

The Subordinate Judge dismissed the suit on the grounds that the plaintiffs' father, as their natural guardian, could without a certificate sell the plaintiffs' properties "under legal necessities;" that prior to the execution of the deed of sale in question, the five pre-emption suits alleged by the defendants were pending, and affected the interest of the plaintiffs' mother in taluk Wari, and the sale was effected *bonâ fide* to compromise those suits, and the consideration was paid to the bankers, to an account which stood in their books in the name of Wasimunnissa the plaintiffs' grandmother, but which was in fact the joint account of her and her daughter Udulun

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nissa the plaintiffs' mother, and the plaintiffs had the benefit of that payment; that the plaintiffs' father Riazuddin, who was by Mahomedan law entitled to one-fourth of his wife's interest in taluk Wari (*i.e.*, to one anna and two-and-a-half gundas), had not, as alleged by the plaintiffs, relinquished that share; that the present suit had been brought in collusion with him, and that he had evaded the process of the Court to obtain his appearance and evidence.

A Division Bench (MITTER and MACLEAN, JJ.,) reversed the judgment of the first Court, being of opinion that it was not proved that any money was, prior to the sale in suit, due from the plaintiffs' estate to the bankers, and that there was no account between the latter and the plaintiffs' estate; that no benefit had resulted to the plaintiffs from the compromise of the pre-emption suits, which appeared to have been brought against their mother and another, after her death, and which could hardly have been successful; and that therefore the plaintiffs had not benefited by the sale of their property by their father and guardian. And the Division Bench, differing therein also from the first Court, were of opinion that the evidence of the plaintiffs, and especially the language of the deed of sale in question, proved that Riazuddin had relinquished his interest in his deceased wife's estate, in consideration of her dower unpaid by him.

A decree in favour of the plaintiffs was accordingly made, and the defendants thereupon appealed to Her Majesty in Council.

Mr. *R. V. Doyne* appeared for the appellants.

The respondents did not appear.

For the appellants, it was contended by Mr. *Doyne* that the first Court had rightly held that the sale had been made by Riazuddin as guardian of the minors for their benefit. That benefit arose either from the liquidation of debts for which their mother's estate was liable, or from the pending litigation being brought to an end by the sale, and its being thereby rendered practicable for the Collector to effect a settlement of three-and-a-half annas of taluk Wari. The High Court's judgment was accordingly wrong, and that of the first Court should be restored.

Again, the evidence including that afforded by the language of the kobala of 1862, had been wrongly treated by the High Court as proof of Riazuddin's alleged renunciation of his share of his wife's estate, in satisfaction of her claim for unpaid dower. That renunciation had been by no means established. Moreover, in regard to the whole case, if the sale should appear on other grounds to have been made without title (though it was submitted that it was not so), it should nevertheless be considered that Riazuddin was at the time of the sale entitled to a share equal to, if not larger than, one anna of Wari, which share therefore passed to the defendants; so that this suit could not be decreed.

Their Lordships' judgment was, on a subsequent day, 19th December, delivered by

SIR R. COUCH.—The suit, which is the subject of this appeal, was brought by the respondents to have it declared that a deed of sale, dated the 7th May 1862, executed by the defendant Sheik Riazuddin Hossein, the father of the plaintiffs, was invalid, and for possession of a one-anna share in taluk Wari, which was the subject of that deed.

Mahomed Ali, who died in November 1854, had two wives, Wasimunnissa and Fakirunnissa. By the former he had a daughter, Udulunnissa, and by the latter a son, Mahomed Hossein. Udulunnissa married the defendant Riazuddin, and died on the 26th October 1861, leaving a son and daughter, the plaintiffs. Taluk Wari had been resumed as invalid lakheraj in 1840, and from that time to its final settlement by the Collector had been temporarily let to various persons. Disputes arose and doubts existed as to the persons who were entitled to settlement, and the final settlement was not made until the 19th May 1862. Between 1840 and 1862, there had been various dealings with the taluk. It will be sufficient to mention those which affected the parties to this suit. On the 19th December 1856, Syed Sufdar Hossein executed a deed of sale of one anna three pie eleven cowries plus a fraction (which may conveniently be called a two-annas share) in the taluk and its dependency Sosi Narhat, in favour of Bhupat Jha and Madhuri Jha in consideration of Rs. 2,250. On the 6th January 1857, Sufdar Hossein executed another deed by which (after stating the sale

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of the 19th December; and that owing to the inattention of the purchasers, the mutual exchange of equivalents did not take place, and the deed of sale remained with him; and that Udulunnissa and Fakirunnissa had, by their karpurdazes, claimed the right of pre-emption by reason of having, previously to the sale to Bhupat Jha and Madhuri Jha, purchased other shares in the taluk), Sufdar Hossein sold the two-annas share to Udulunnissa and Fakirunnissa for Rs. 2,250. On the 11th August 1856, the 4th December 1856, the 6th January 1857, the 29th January 1857, and the 23rd February 1857, purchases of other shares in the taluk and its dependency were made by Udulunnissa and Fakirunnissa. These shares, together with the share sold to them on the 6th January 1857, made up nine annas of the taluk, half of which was declared to belong to each of them. On the 31st December 1861, five suits were instituted against Fakirunnissa and Udulunnissa by Sardari Jha, the ancestor of some of the defendants, to establish a right of pre-emption to the shares composing the nine annas, and the Collector had before him these conflicting claims to the settlement.

It was in this state of things that the deed of the 7th May 1862 was executed by the duly empowered mokhtear on behalf of Riazuddin Hossein, described as the father and guardian of the plaintiffs, minor heirs of Udulunnissa, and on behalf of Fakirunnissa, mother and guardian of Mahomed Hossein, her minor son. By this a two-annas share of the nine annas of the taluk was sold for Rs. 6,235 to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as the shareholding proprietors and inhabitants of the taluk Wari. And it was stated that the Rs. 6,235 was for liquidating the debts due to Baboo Gopal Das and Bunsi Lal, mahajuns. One anna was said to be purchased by Bhupat Jha, and one by the other three. The books of the firm of Gopal Das and Bunsi Lal were produced. They contained accounts in the name of Mussummat Wasimunnissa, the grandmother of the plaintiffs, who appeared to be possessed of considerable property, but had no interest in the taluk Wari. From various entries in these accounts they appeared to relate to this taluk as well as to the property and transactions of Wasimunnissa. In the account for the year

1269 (1861-62), under the native date corresponding with 16th May 1862, is the following entry :—

	Rs.	As.	P.
The 3rd Jeyt Budi.—Received on account of the consideration money of two annas of taluk Wari debited to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha	6,235	0	0
Deduct on account of the share of Fakirunnissa, which is debited to her	3,117	8	0
Remainder ... ... Rs.	3,117	8	0

On the other side of the account, under a date corresponding with the 13th January, among the entries of "paid on account of revenue into Collectorate," there is an entry "Wari, Rs. 181-9," and under a date corresponding with the 29th March an entry "Wari of Raja, Rs. 447-15," and on the date corresponding with the 26th May 1862 there is an entry, "Paid through Sheik Velait Hossein, in order to defray the expenses of the settlement of taluk Wari Rs. 2,500." It appears from the proceedings of the Collector of Tirhoot, dated the 19th May 1862, in a suit for obtaining permanent settlement of taluk Wari, that a petition was filed on behalf of Bhupat Jha and Madhuri Jha, stating that they were the purchasers of one anna three pies and eleven cowries and a fraction share, and subsequently on the 10th May 1862 a petition of withdrawal was filed on their behalf, stating that they withdrew from that claim filed previously, and praying that the deed of sale to them on the 19th December 1856 might be considered ineffective, and that the settlement might be effected with Fakirunnissa and others. And that subsequently on the 12th May 1862 another petition was filed on their behalf with the deed of the 7th May 1862, praying that a settlement of the two-annas share mentioned in that deed should be made with them. On the same 7th May 1862, consent decrees were made in the five pre-emption suits by which they were dismissed. Thus all opposition on the part of the Jhas as regards seven annas was withdrawn, and they claimed the settlement of only two annas under their new title. In the end, the settlement was made with Fakirunnissa, described as mother and guardian of Mahomed Hossein, and Riazuddin, described as father and guardian of the plaintiffs, for seven annas of the nine, and with the Jhas for the

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remaining two annas. The allegation in the plaint that Riazuddin appropriated the consideration for the sale of the 7th May 1862, was not only not proved, but was disproved, and nearly the whole, if not the whole, of the consideration appeared to have been applied on account of the taluk.

The Subordinate Judge held that the deed of the 7th May 1862 was valid, saying in his judgment that the pre-emption suits and the defendants' claim case before the Collector were "impending dangers over Wari at that time, and what might have been the consequence of those objections cannot be now determined at this distance of time, and I should therefore think that Riazuddin acted wisely in making a compromise with the defendants by executing the disputed kobala so soon as only eleven months after the death of Udulunnissa, and thereby to avert that danger." He dismissed the suit. The High Court set his decree aside, and made a decree for the plaintiffs, being, they said, "on the whole of opinion that the respondents (the defendants) failed to establish that any benefit was conferred upon the appellants by the sale by their father of the disputed property." The statement in the deed, and in the petition to the Collector on the 12th May 1862 of Riazuddin and Fakirunnissa, asking that a settlement of the two-annas share should be made with the Jhas, that the sale was for the purpose of liquidating debts due to the mahajuns, is not correct, though looking at Gopal Das's account, and the large payment made by his bank on account of Wari three weeks afterwards, the parties may have thought that it was correct; but at all events their Lordships think it does not preclude the defendants from proving the real nature of the transaction and that it was a beneficial one to the minors.

It is not a case of a sale by a guardian of immoveable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances.—Macnaghten's Principles of Mahomedan Law, chap. VIII, cl. 14. The right of Udulunnissa and Fakirunnissa to be purchasers of the nine annas was disputed. By the sale of the two annas, the dispute was put an end to, and thus a settlement obtained of the seven annas. Moreover the Rs. 6,235 appeared

to be a fair price for the two annas which had in December 1856 been sold by Sufdar Hossein for Rs. 2,250.

Their Lordships differ from the opinion of the High Court that the present appellants, who were then respondents, had failed to establish that any benefit was conferred upon the minors by the sale. They are of a contrary opinion, and looking at the whole transaction they think it was within the power of the guardian to make the sale.

There is another ground upon which the appellants are entitled to have the decree of the High Court reversed, and the decree of the Subordinate Judge dismissing the suit affirmed.

The case stated in the plaint is that Riazuddin had sold to the defendants one anna out of four-and-a-half annas, the property left by Udulunnissa in taluk Wari, and the plaintiffs only got three-and-a-half annas partitioned to them by the Collector. Now Riazuddin, as the husband of Udulunnissa, was entitled to one-fourth share of her property, and consequently the plaintiffs were in possession of more than they were entitled to by inheritance, their shares amounting to $3\frac{3}{8}$ annas. This objection was taken in the written statement of the Jha defendants. It was attempted to be met by some loose evidence of Riazuddin being liable for dower and relinquishing his share to the plaintiffs on that account. No document was produced, and the Subordinate Judge found, as a fact, that Riazuddin did not relinquish his one-fourth share. Their Lordships are of opinion, upon the evidence, that this finding was proper, and that the reason given by the High Court for not agreeing in it is insufficient. An admission of Riazuddin that he had relinquished his share, even if it was clearly made in the deed of sale, ought not to affect the other defendants. He had been ordered to attend as a witness, and did not do so, and the Subordinate Judge thought he was in collusion with the plaintiffs. This was highly probable, and the suit appears to their Lordships to be a dishonest attempt to get back property, for which the plaintiffs had received full consideration, and had had the benefit of it.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to

the High Court, with costs, and to affirm the decree of the Subordinate Judge.

The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

C. B.

P. C.* 1888 *December 6 and 19.*

* IN THE MATTER OF THE PETITION OF R. E. TWIDALE.

Privy Council, practice of—Admission to practise in the Privy Council—Rules of 31st March 1871—Vakil of High Court.

The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practise in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee.

THIS was a petition by Mr. Richard Erasmus Twidale, a pleader in the High Court, Calcutta, to be admitted as Agent to practise in the Privy Council, upon his subscribing the declaration prescribed by the rules established by the order of Her Majesty in Council of 31st March 1871, "to be observed by Proctors, Solicitors, Agents and other persons admitted to practise before Her Majesty's Honourable Privy Council" (1).

After requiring in the first section that every Proctor, Solicitor, or Agent admitted to practise before the Privy Council or any of the Committees thereof, shall subscribe a declaration in the form given, the rules contain the following:—

2. Every Proctor, Solicitor, or Attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his certificate for the current year.

3. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors to the High Courts of Judicature in India or in the Colonies respectively, may apply by petition to the Lords of the Judicial Committee of the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th November, a fee of five guineas to the Fee Fund of the Council Office.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

(1) The rules are printed in the Appendix to "The Practice of the Judicial Committee," by William Macpherson, Esq., at p. 65.

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Mr. *R. V. Doyne*, in support of the petition, argued that the scope of the Rules of 1871 having been to state certain duties to be discharged by practitioners upon admission, their object had not been to define the classes of persons to be admitted to practise. This was left to be, as it must have been before the rules, a matter discretionary with their Lordships; and the second and third sections specified those classes in imposing a duty upon them, which hitherto alone had been admitted. But the rules were for an enabling purpose, imposed no limit upon the powers of the Committee, and used no negative words to confine the term "Agents" to any classes of persons. He referred to the case of *In the matter of the petition of W. Tayler.*

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—Since this case was argued their Lordships have considered the matter very carefully and they have been furnished with a copy of the shorthand notes of the proceedings on Mr. Tayler's petition; and they find, with some regret, that they are unable to accede to Mr. Twidale's request.

Mr. Twidale is a vakil of high standing and reputation in the Calcutta High Court; but he has not been admitted as a Solicitor anywhere, in England or in India. He now applies to be admitted to practise here as an Agent, and the question is whether the Orders in Council admit of such an application being granted. No doubt, there is some ambiguity about them because in general terms they refer to "Proctors, Solicitors, or Agents." There are four sections of the Order relating to the subject, and in the first and fourth of those sections all those terms are mentioned; but the two sections which show what is the mode of admission, and the classes to be admitted, are the second and third; and those only apply to Solicitors or others practising in London, and to Solicitors admitted by the High Courts in India or the Colonies respectively. The question is whether those rules 2 and 3 are exhaustive of the classes to be admitted, or, as was argued by Mr. Doyne, they only specified what should be done in the case of those two classes, and left an undefined class called "Agents," who were to be admitted at the discretion of the Committee. Mr. Tayler's case, which has been cited, is exactly in point. Mr. Tayler also was a vakil of the Calcutta High Court, and he had

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not been admitted as a Solicitor anywhere. He applied for leave to practise at this bar. His Counsel, Sir Roundell Palmer (Lord Selborne) put the case very much as Mr. Doyne has done. Lord Cairns, on behalf of the Committee, said in that case "the qualifications are in the Schedule." That means in the Orders I suppose; it is a mistake of the shorthand writer. "The third appears to be the only one upon which any claim can be made. The third applies to Solicitors practising in India." Then Sir Roundell Palmer said "yes, I see there are affirmative words which do not embrace this case: I do not perceive that there are any negative words which would exclude it." Well that is precisely the argument which Mr. Doyne put at the bar here. The answer to this is, "Lord Cairns:—There was an obvious reason for specifying the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakils who are under very different jurisdictions, but certainly they are not included at present in the Order." That (as will be seen) is exactly in point.

Their Lordships collect that the Committee on that occasion, as on this, were by no means disinclined to grant the petition, if it were within their power. But it has been expressly decided that it is not within their power, and their Lordships now must follow that decision, and refuse the application.

Petition rejected.

Solicitors for the petitioner: Messrs. *T. L. Wilson and Co.*

C. B.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

1889
May 21.

MOHESH CHUNDER CHUTTOPADHYA (DEFENDANT) *v.* UMA-TARA DEBY (PLAINTIFF).*

Appeal—Bengal Tenancy Act (VIII of 1885), *s.* 153—*Cesses, Suit for—Bengal Act (IX of* 1880), *s.* 47—*Appeal in cases under Rs.* 100.

A suit to recover cesses for an amount not exceeding Rs. 100 falls under the provisions of s. 153 of Act VIII of 1885 with respect to appeals.

* Appeal from Appellate Decree No. 1545 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 27th of June 1888, reversing the decree of Baboo Dino Nath Sircar, Munsiff of Baruipore, dated the 31st of December 1887.

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MOHESH CHUNDER CHUTTOPADHYA v. UMATARA DEBY.

THIS was a suit for cesses.

The defendant admitted the tenancy, but contended that as no valuation of the tenure, since his holding had commenced, had been made by the Collector, he was not therefore liable to pay any cesses.

The Munsiff dismissed the suit. On appeal the District Judge reversed the Munsiff's decision and gave the plaintiff a decree for the amount claimed which was a sum under Rs. 100.

The defendants appealed to the High Court.

Baboo *Nil Madhub Bose*, for the respondent, took the preliminary objection that, under s. 153 of the Rent Act, there was no appeal, the suit being in reality one for rent, cesses being recoverable as rent under Bengal Act IX of 1880, s. 47, and the word "rent" in cl. 5, s. 3 of the Bengal Tenancy Act, being defined as "money recoverable under any enactment for the time being in force as if it was rent."

Baboo *Sharoda Churn Mitter* for the appellant.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

GORDON, J.—We think that the preliminary objection taken by the respondent in this case, that no appeal lies, must prevail. The appeal arises out of a claim for cesses less than Rs. 100, which, under s. 47 of the Cess Act (Bengal Act VIII of 1880), are made recoverable in the same way as an arrear of rent. And, under the definition of rent given in cl. 5 of s. 3 of the Bengal Tenancy Act (Act VIII of 1885), rent "includes also money recoverable under any enactment for the time being in force as if it was rent." That being so, the suit is really a suit for rent; and as the defendant has raised no question in his written statement as to the amount of cess which is payable by him to the plaintiff, no dispute has been decided between the parties which would have the effect of bringing the case under the provision of para. 4 of s. 153 of the Bengal Tenancy Act. We think the case does not fall within that paragraph, and that, consequently, no appeal lies to this Court. That being so, this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

PROSONNA COOMAR SINGHA (ONE OF THE DEFENDANTS)
v. RAM COOMAR GHOSE (PLAINTIFF).*

1889
May 28.

Right of user—License to use land of another, coupled with grant—Revocation of License—Right of licensee to damages.

A license to use the land of another, unless coupled with a grant, is revocable at the will of the licensor, subject to the right of the licensee to damages if revoked contrary to the terms of any express or implied contract. *Wood* v. *Leadbitter* (1) applied.

SUIT for declaration of right over a plot of land and for an injunction.

The plaintiff claimed, under a solenamah entered into between himself and the defendant, to have the use of a plot of land belonging to the defendant as his privy; the defendant admitted the solenamah, but objected to the use of the land for the purpose referred to, and contended that the solenamah was obtained from him whilst a minor, and that the suit was barred.

The Munsiff found that the land had been used by the plaintiff as alleged, that there was no defence to the suit, and granted a decree prohibiting the defendant from preventing the plaintiff using the land for the purpose alleged in his plaint.

The Subordinate Judge on appeal upheld this decree.

The defendant appealed to the High Court.

Mr. *H. Bell* (with him Baboo *Tarucknath Sen*) for the appellant contended that the license granted by defendant to the plaintiff was revocable at any time subject to a liability to pay damages. *Wood* v. *Leadbitter* (1).

Mr. *Twidale* and Baboo *Durga Mohun Das* for the respondent.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This is a suit by the plaintiff to have his rights declared under a contract made between him and the

* Appeal from Appellate decree No. 1449 of 1888 against the decree of Baboo Purno Chunder Shome, Subordinate Judge of Dacca, dated the 25th of May 1888, modifying the decree of Baboo Purno Chunder Chowdhry, Munsiff of Munsheegunge, dated the 19th of May 1887.

(1) 13 M. & W, 838.

defendants, and to obtain an injunction against the defendants restraining them from breaking the contract.

The contract is in respect of some land as to the ownership of which some years ago there was a dispute between the plaintiff and the defendants. That dispute was finally settled by the present plaintiff giving up all claim to the land, and admitting that it was the property of the defendants, and in consideration of his doing so the defendants agreed to allow him to go on to the land at all times for the purpose of using a particular corner of it as a privy. That went on for a great number of years apparently, but in course of time the defendants used this land for purposes inconsistent with its continued user in this way, and though the plaintiff might have gone on to the land and used it in the same way, he would have become a nuisance, and what he did would have become a nuisance, and it was under these circumstances that the defendants refused to allow him to go there any more for that purpose, and it is to assert this right that this action has been brought.

This action has been defended in the two lower Courts on various grounds. I should say that no claim was advanced for damages, but only for an injunction to compel the defendants to allow the plaintiff to use the land in this way. But the point was never made, until the matter came to this Court, that this was a license which was revocable at any time subject to the liability to pay damages. That point has been taken here, and we think it is a perfectly good one. The law, so far as we have been able to ascertain, is the same in this country as it is in England, there being so far as we can see no common law in this country on the subject and no statutory law either. The law in England is clearly laid down in the case of *Wood* v. *Leadbitter* (1). The Courts have acted upon the law as there laid down ever since, and it has always been held to be good law and binding upon them. That case decided that the license to go upon another man's land, unless coupled with a grant, was revocable at the will of the grantor, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied contract.

(1) 13 M. & W., 838.

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That being so, we think that the Munsiff and the learned Judge were both wrong in granting an injunction in this suit, but inasmuch as this point was not taken below, and there is no doubt about it that the defendant has acted in this case in a high-handed manner, he has revoked this license and has prohibited the plaintiff from using the land without offering compensation; therefore, although we think that this appeal must be decreed and the suit dismissed, we think that each party ought to bear his own costs all through. In the result then, this appeal will be decreed and the plaintiff's suit dismissed without costs.

Appeal allowed.

T. A. P.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon,

KRISTO BULLUV GHOSE AND OTHERS (DEFENDANTS) *v.* KRISTO LAL SINGH AND ANOTHER (PLAINTIFFS).*

1889. *May 29.*

Bengal Tenancy Act (VIII of 1885), s. 12—Transfer of a permanent tenure—Permanent tenure, Registration of.

The transfer of a permanent tenure under s. 12 of the Bengal Tenancy Act is complete as soon as the document is registered.

THIS was a suit brought by two putnidars to recover from their durputnidars rent from Bysack to Kartick 1292 and from Aughran 1292 to Kartick 1293, together with cesses.

The defendants admitted they held the durputni tenures up to the 1st Bysack 1293, on which date they sold the tenure to one Keshub Chunder Roy, whose name was duly registered in place of theirs in the Sherista of the putnidars. The deed of sale was duly registered and the putnidars fee duly deposited with the Sub-Registrar under s. 12 of the Bengal Tenancy Act. The notice under that section was however served on one only of the putnidars.

The Munsiff gave a decree to the plaintiffs for the rent claimed, holding that the notice under s. 12 was bad, it not having been served on both the plaintiffs.

* Appeal from Appellate Decree No. 1549 of 1888, against the decree of H. Anderson, Esq., Judge of Moorshedabad, dated the 8th of June, 1888, affirming the decree of Baboo Loke Nath Nundi, Munsiff of Kandi, dated the 26th of December 1887.

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The District Judge found that there was nothing in s. 12 which obliged the defendants to inform either the Sub-Registrar or the Collector of the names and addresses of their landlords, but said "I take it that the putnidars are clearly not bound to recognize any transfer of which they have not received due notice. Now granting for a moment that plaintiff No. 1 did receive notice, I think the Munsiff was quite right in holding that to be insufficient. There must, I hold, be a complete notice, *i.e.*, one which has been served on each landlord, not necessarily personally, but in the mode prescribed in rule 1 of chapter V of the Rules under the Bengal Tenancy Act (pp. 258, 259 of Rampini's and Finucane's 1st Edition);" and, after finding that the notice had not been served in accordance with this rule, he dismissed the appeal and confirmed the decision of the Munsiff.

The defendants appealed to the High Court, on the ground that the provisions of s. 12 had been sufficiently complied with.

Baboo *Rash Behari Ghose* and Baboo *Aushotosh Mukerjee* for the appellants.

Baboo *Troylucko Nath Mitter* for the respondents.

The judgment of the Court (PETHERAM, C.J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This is a suit brought by a landlord, who is the putnidar, to recover the rent of the durputni.

The answer which is made by the defendant is this,—He says: a part of the rent I owe you, and I have paid that into Court; as for the rest I am not liable to you, because at the time when that rent accrued I had transferred the durputni to a purchaser under the provisions of the Bengal Tenancy Act, ss. 11 and 12, and that transfer, so far as I was concerned, was complete.

The answer which the landlord makes to that is this,—He says: that is quite true, you did make the transfer you say, but I did not receive notice of it from the Collector, and therefore, notwithstanding the fact that you had transferred your interest, you are still liable for the rent, and the question for us to consider is that question.

Section 11 of the Bengal Tenancy Act provides that every permanent tenure shall be capable of being transferred. That

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may or may not be declaratory of the old law, but for the purpose of what I am going to say, that is the law that is created by that Act, and every such tenure is made transferable by the authority of that Act. Then comes s. 12, which limits the power of transfer. If it were not for s. 12, the transfer under s. 11 might be made in any way, either by an unregistered deed, or verbally; but s. 12 of the Act provides a limit, and the limit is this, that the transfer of permanent tenures can be made only by a registered instrument. In this particular case, it was made by an instrument which it is admitted was duly executed, and which it is also admitted was duly registered, and consequently the transfer from the vendor to the vendee was complete. Then come the other parts of the section, and sub-section 2 provides a condition precedent to the registration, that certain monies shall be paid by the vendor into the hands of the Registrar before he shall be entitled to the registration, but the registration concludes all that, because the registration could not take place unless those things had been done, and it is not disputed in this case that those things were done, so that the registration is absolutely complete.

Then comes another sub-section which provides what the Registrar is to do after the registration, how he is to dispose of the money in his hands, and what notices he is to give of the fact of registration; but that seems to us to be a mere question as to how he is to deal with the matter and how the Collector is to deal with the money when it comes into his hands. But, so far as the transfer is concerned, the only thing which this Act says is necessary to complete it is registration. That was done, and it seems to me that the transfer was complete as soon as the document was registered.

Then is there any reason or possibility to say that, notwithstanding the fact that the transfer was complete, this man still remained liable to his landlord. The liability here is a liability in consequence of the estate, and it is admitted that it is an ordinary rule that the liability ceases when the estate is transferred and the vendor ceases to have any estate in the property, but that, in whatever way the transfer may be made, the liability remains on the original tenant, until notice has been given to the landlord,

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As to that, it is enough for us to say that the Act is absolutely silent upon the point, and we do not think that any such condition of things can be inferred from the provisions of the Act. If the Legislature had intended to impose any such limitation upon the right to transfer, we think they would have said so in so many words. They have not done so, and we think we cannot imply it from what they have said.

Under these circumstances we think that the Judge was wrong in the view he took of the law in this case, and this appeal must be decreed with costs.

Appeal decreed.

T. A. P.

Before Mr. Justice Pigot and Mr. Justice Rampini.

1889
May 14*th.*

GOLUCK NATH *alias* RAKHAL DAS CHUTTOPADHYA AND ANOTHER (PLAINTIFFS) *v.* KIRTI CHUNDER HALDAR (DEFENDANT).*

Second appeal—Practice—Finding of facts—Interference with finding of facts on second appeal.

As a general rule, the High Court will not interfere with the finding of facts by the lower Appellate Court on second appeal, save on some very special ground; for instance, where such a finding of facts as appears to be necessary under the peculiar circumstances of the case, has not been satisfactorily arrived at.

SUIT for declaration of title and khas possession.

This suit was brought for a declaration that the plaintiffs were entitled by right of inheritance to a plot of land, measuring 14 bigahs 6½ cottahs, and for possession of the same.

The plaintiffs alleged in their plaint that their father, Gopal Chunder Chuttopadhya, was in khas possession of the land; that, upon the death of their father, this piece of land as well as other lands and property left by him, were under the management of their mother, Troilokho Monee Debi; that in the month of Joisto 1290 (May 1883), the defendant, Kirti Chunder Haldar, who was in possession at the time, was requested by the plaintiff,

* Appeal from Appellate Decree No. 1394 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 21st of March 1888, reversing the decree of Baboo Janokee Nath Mukerjee, Munsiff of Diamond Harbour, dated the 16th of September 1887.

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Goluck Nath Chuttopadhya, to execute a kabuliat of the land, which the defendant refused to do on the ground that his father had purchased the land from Troilokho Monee Debi under a kobala dated the 15th Bysack 1285 (27th April 1879). The plaintiffs further alleged that the kobala was a fraudulent document; that there was no consideration for it; and that even if any consideration had passed, it was invalid as against the plaintiffs, inasmuch as they were minors at the time, and there was no legal necessity for the sale of the land by their mother, nor was the sale for their benefit. The defendant contended that in 1284 (1877-78) when Gopal Chunder, the plaintiffs' father, died, the defendant's father as Gopal's servant was in possession; that upon the death of Gopal, his widow Troilokho Monee, with the object of supporting her sons, the plaintiffs, of paying the arrears of rent for which the landlord had obtained a decree, and of meeting the expenses of her husband's shrad as well as other liabilities, sold the land in suit to the defendant's father for Rs. 175 under a kobala dated the 18th Bysack 1285; that the kobala was not fraudulent, and was for an adequate consideration; and that the sale was made by the plaintiffs' mother under a legal necessity for the benefit of her sons.

The Munsiff found that Troilokho Monee Debi had no sufficient reason for alienating the land, and that the sale therefore was not for the benefit of the plaintiffs. He also found that the consideration money had not been paid. In arriving at these findings, the Munsiff made the following observations:—

"The kobala of the defendant (Exhibit A) filed in the case purports to have been executed by Troilokho Monee Debi herself, on account of paying the arrear rent due to the landlord, and for meeting the expenses of supporting her two minor sons. She did not sign the kobala as guardian of the minors, and so far the sale does not appear to have been on account of the minor sons of Troilokho Monee. But this defect may be considered as a mere formal one, so I enter upon the merits of the case. In order to show that consideration passed for the kobala, and that it was executed for the benefit of the minors, the defendant examined four witnesses before the Court, and another of his witnesses was examined by Commission. The defendant himself

also gave his deposition in this case, and now let us see how far the defendant's plea is made out. The defendant himself deposed that, out of Rs. 157, the consideration payable under the kobala, Rs 65-7-6 were not paid by his father who made the purchase, and that it was kept by him to pay the arrears due to the landlord for 1284, and to satisfy a decree also of the landlord, of which a certified copy is filed in this case. This decree (Exhibit B) on perusal shows that the money due upon it was payable by instalments. The first of the instalments was payable in Magh 1284, the second in Magh 1285, and the third in the month of Magh 1286. The Exhibit C, which is a copy of the execution petition filed in Court by the landlord, shows that the instalment due on account of the first instalment was paid in Magh 1284, namely, before the date of defendant's father's purchase, and that the second instalment fell due long after the date of the kobala, so that, at the time of the execution of the sale-deed, the plaintiffs' mother was not pressed for money to pay the decretal debt, nor was it then possible for the defendant's father to guess what would be the debt under the decree with the cost of execution on the 5th September 1879, when he actually paid the debt due upon it. The debt upon the decree that was payable at the date of the kobala was Rs. 31-5-6 only. The landlord's dues on that date on account of the rent of the year 1284 were Rs. 10-10-6, with a trifling amount on account of interest and cesses. That the amount of arrears was no more is visible from the fact that the jama of the disputed land was Rs. 28-10-6 (See Exhibit B); and that out of this the plaintiffs' father did pay Rs. 18 (See Exhibit No. 3). This Exhibit is proved by the deposition of the defendant's witness No. 3. As the rent due on account of the disputed land for the year 1284 was a trifling amount, and as the decreed debt was not then payable, I am of opinion that the plaintiffs' mother had no sufficient reason to alienate the disputed land, and the sale was therefore evidently not for the benefit of the minors.

"As regards the passing of the consideration money on account of the kobala, I feel very great doubt. I have already commented upon the fact that the plaintiffs' father had no debt payable at the time the kobala was executed, and that the debt under the decree,

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and the arrears due respecting the rent of the disputed land, did not come up to Rs. 65 and odd annas, and that the defendant's father had no reason to keep back that amount out of the consideration money. There is also no proof of the payment of Rs. 3 paid as earnest money. The defendant and his witnesses, Nos. 1 and 2, no doubt deposed that Rs. 88-8-6 were paid to Troilokho Monee in cash during the time the kobala was executed, but there is some discrepancy on this point, the witness No. 2 deposing that no pice was paid, whereas the defendant stated that it did pass. The witness of the defendant, the writer of the deed, who was in a very bad state of health, and though present in Diamond Harbour, could not come up to Court, was examined upon Commission. He deposed that Troilokho Monee only took Rs. 15, and that the remainder of the purchase money was paid in the Registration Office to the plaintiffs' maternal uncle. This deposition strongly goes in opposition to the statements of the defendant's witnesses Nos. 1 and 2, and the passing of the consideration money seems to me to be very suspicious. The witness No. 1 of the plaintiffs is related to them, and the witness No. 2 is the father of their servant. Their deposition is also open to doubt on that account, and I hold that no consideration did pass for the deed of sale.

"It is true that the defendant's father is proved to have paid the rent of 1284 to the extent of Rs. 10 and odd annas, but being the person in possession of the land he was bound to pay it, and to pay also the decretal debt, which, if not paid, would have made his lands liable to sale for its own arrears. These payments were made long after the date of the purchase, showing that the defendant paid them to protect his land from sale. The payment of these sums do not, therefore, make out payment of consideration."

The Munsiff accordingly decreed the plaintiffs' suit.

The defendant appealed, and the Additional District Judge of the 24-Pergunahs reversed the Munsiff's decision. The judgment of the lower Appellate Court was as follows:—

"This was a suit to upset a sale effected by plaintiffs' mother and guardian, on the ground that no consideration passed for the transaction, and that it was against the minors' interest.

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Plaintiffs do not directly assert that their mother did not execute the deed, and they have not called her as a witness. The execution has been fully proved, and the only point for decision is, was the sale valid? The Munsiff has found that it was not, and has decreed the suit. Defendant appeals.

"Admittedly defendant has been in possession of the land for ten years. The deed of sale is dated 15th Bysack 1285 (27th April 1878), and the suit was brought on 5th March 1887 (22nd Falgun 1292). Plaintiffs admit that defendant had the land before the alleged sale, for they say that their father let it to defendant. Now their father died in 1284. Defendant is in a difficult position in having to show how money was disposed of, which was paid by his father nine years ago. The sale was made by Troilokho Monee. She does not, at the top of the deed, describe herself as the guardian of the minors, but the body of the deed shows that it was in the capacity of the guardian that she sold the property, and for the benefit of the minors. The Privy Council case of *Watson & Co.* v. *Sham Lall Mitter* (1) shows that if there is any doubt as to the capacity in which a mother acts in such a case as this, it should be presumed that she did so in her lawful capacity. The defendant has proved by his own evidence and that of his witnesses that adequate consideration was paid for the deed. He has shown that his father kept back part of the purchase money, and discharged debts due by plaintiffs' father's estate, and that the rest went into the hands of Troilokho Monee. The landlord's petition to the effect that the first instalment of the kistibundi was paid on 23rd Magh 1284 is not, I think, evidence against defendant. Defendant produces a dakhila for payment of Rs. 30 odd on account of the rents of 1284: even if it be held that Rs. 18 of this were paid by Gopal Thakur, still Rs. 120 odd annas and not Rs. 10, as stated by the Munsiff, were paid by defendant's father. I do not know how the Munsiff came to the conclusion that this payment was made long after the purchase. The purchase was in Bysack 1285, and presumably the rent for 1284 was paid in Choit 1284 or Bysack 1285. The fact that other payments

(1) I. L. R., 15 Cal., 16.

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were made some time after the purchase, is consistent with defendant's evidence, and does not show that the sale was not for consideration. The Zemindar's gomashta deposes that Gopal Thakur was not in good circumstances, and so we need not be surprised that his widow found it necessary to raise money for the support of her children by selling some of the property.

"In my opinion defendant has proved that the sale was a valid one; that consideration was given; and that the sale was to the advantage of the minors.

"I attach no importance to the few discrepancies in the account of the witnesses to the sale. Such discrepancies must occur when witnesses are speaking to the mode of payment, and the distribution of money at a transaction which occurred about ten years before.

"Plaintiffs have failed to establish their allegations, and defendant has established his. I therefore reverse the decision of the Munsiff, and decree the appeal with costs; the result being that the suit is dismissed with costs of both Courts and interest at 6 per cent."

The plaintiffs appealed to the High Court.

Baboo *Baikant Nath Dass* for the appellants.

Baboo *Harendra Nath Mukerjee* for the respondent.

The judgment of the High Court (PIGOT and RAMPINI, JJ.) was as follows:—

The rule followed in this Court not to interfere, save on some very special ground, with a finding of facts by the lower Appellate Court on second appeal, is one which we follow with very jealous care; but in this case we cannot say that such a finding of facts, as in a case of this peculiar kind appears to us to be necessary, has been satisfactorily arrived at by the lower Appellate Court.

We have these facts: The defendant's father, a servant of the plaintiffs' father, purchases from the plaintiffs' mother, when she becomes a widow, the property in question. He purchases it shortly after the plaintiffs' father's death. The consideration money is Rs. 157. Of that consideration money, Rs. 65 admittedly remained in his hands, either with the intention or under colour

of meeting liabilities in respect of this property, incumbent on the family of the plaintiffs. The liabilities which then existed in respect of the property consisted of the rent for 1284, which was Rs. 12, and the amount payable at foot of a decree for rent for some previous years was in Bysack 1285, the date of the sale, about Rs. 31. That was payable by instalments falling due in Magh. The instalment due in the previous Magh, that is Magh 1284, had been paid by the plaintiff's father. There was therefore in Bysack 1285 no instalment due, and no urgent need of money pressing on the family in respect of this piece of land, beyond the sum of Rs. 12 for payment of the 1284 rent. We do not understand that the rest of the Rs. 65 is accounted for. As to the residue of the purchase money, two things were disputed, *one*, that there was any necessity for that money such as to justify the widow in selling the property; and, *another*, that the consideration passed.

The learned Judge has not made such findings as satisfactorily show that the plaintiffs' case must fail. He has not stated in his judgment in respect of what necessity he considers the sale to be justified. He has not adverted to the circumstance of the retention of money in the defendant's hands, which was not needed for the purpose of the family; and he has not adverted to this, that, when a servant of the plaintiffs' father purchased from the widow, his relation to the family makes it reasonable that from him or his representative should be exacted very complete proof of the necessity and of the passing of the consideration. The first Court has noticed that the writer of the deed himself, called on behalf of the defendant, has stated that no money, save Rs. 15 of the consideration money, was paid to the widow, the residue of such money as was paid having been paid to the widow's brother. We think that that was a circumstance that ought to have been dealt with in the judgment.

There are many cases in which a simple compendious finding of fact is quite enough to satisfy all requirements; but in a case of this sort, while it is our duty not to set aside clear findings of fact, save on grounds which rarely exist, we are bound to see that a proper view of the law in the case has been taken and applied by the Subordinate Court; and we do not feel satisfied

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that that has been done here. The case before us is, in its circumstances, one requiring very close scrutiny; and we are of opinion that the learned Judge has not made a satisfactory finding in respect of the question of necessity, in respect of the receipt of the consideration money by the mother of the plaintiffs, and in respect of the reality of the transaction as a sale for necessity, the purchaser purchasing on the faith of that necessity, and whether or not with full knowledge of the circumstances of the family.

We must remand the case to the lower Appellate Court for a finding upon the matters we have indicated. The costs will abide the result of the learned Judge's determination of the case on this remand.

C. D. P. *Case remanded.*

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May 17.

Before Mr. Justice Pigot and Mr. Justice Rampini.

RAKHAL DAS ADDY, EXECUTOR TO THE ESTATE OF LATE GOVIND CHUNDER ADDY (PLAINTIFF) *v.* DINOMOYI DEBI AND OTHERS (DEFENDANTS).*

Right of Occupancy—Suburban lands let for building purposes.

There is no authority for the proposition: "that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."

Gungadhur Shikdar v. *Azimuddin Shah Biswas* (1) explained.
Ramdhun Khan v. *Haradhun Puramanick* (2) relied on.

SUIT for ejectment and khas possession.

Rakhal Das Addy brought this suit, as executor of the will of his father Gobind Chunder Addy, to eject the defendants from a piece of land about half a bigha in area, situate in the village of Chetla in the suburbs of Calcutta.

* Appeal from Appellate Decree No. 1495 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 25th of April 1888, reversing the decree of Baboo Hari Krishna Chatterjee, Munsiff of Alipore, dated the 7th of November 1887.

(1) I. L. R., 8 Cal., 960.
(2) 12 W. R., 404 : 9 B. L. R., 107 note.

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The plaintiff alleged that by a kobala dated the 29th Bhadro 1276 (13th September 1869), Doyamoni Dasi sold 1 bighā 9 cottahs of land, including the half bigha in suit, to the plaintiff's father Gobind Chunder Addy; that on the 27th Assin 1293 (12th October 1886) the plaintiff served the defendants with notice to quit by the end of the month of Choitro (April 1887); and that the defendants had not complied with the terms of such notice.

The defence was that the tenure had been sold to Dinomoyi Debi (defendant No. 1) by Gora Chand Sadhukhan, the father of the defendants Nos. 2, 3 and 4, under a kobala dated the 27th Bhadro 1274 (11th September 1867); that the tenure was agricultural and permanent; that Dinomoyi and her predecessors in title had been in possession for nearly a hundred years, and that Dinomoyi had acquired a right of occupancy in the land.

The main issues in the case were, *first*, whether any notice had been served upon the defendants and was it sufficient in law? and, *secondly*, whether the defendants had acquired a right of occupancy in the land?

The kobala of the 27th Bhadro 1274 recited that the land was held under a pottah dated 1229, and that the deeds relating to the land had all been made over by the vendor, Gora Chand, to the defendant Dinomoyi. The defendants did not produce this pottah nor the other deeds at the trial, nor attempt to account in any way for their absence.

The Munsiff held that notice to quit had been duly served upon the defendants and that it was valid in law. He found that the tenure was not a permanent one; that the land was neither agricultural nor horticultural but homestead land; and that it had been actually occupied for building purposes; and accordingly held that no right of occupancy had been acquired in the land.

The Munsiff therefore decreed the suit.

The defendant Dinomoyi and one of the other defendants appealed.

The Additional District Judge, while he agreed with the Munsiff in holding that a valid notice to quit had been duly served on

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the defendants, differed from him on the question of the right of occupancy in the land. As regards this question the learned Judge observed:

"I think it is clear that the land is not agricultural or horticultural land. It is too small for such a purpose, it is in a town or suburb, and it seems always to have been used for trading or residentiary purposes.

"It does not however follow that defendants cannot have an occupancy right in it. It may not be an occupancy right of which the Bengal Tenancy Act will take cognizance, and it may be that the enhancement suits formerly instituted were brought under a mistake of law, but there are of course occupancy rights besides those recognized by the Landlord and Tenant Acts.

"The case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (1) seems to me in point. I cannot see any distinction between it and the present case. The buildings in that case were substantial, it is not said that they were pucca, and it appears that the buildings in the present case may fairly be called substantial. They have existed apparently for many years, and two of them have thick mud walls.

"Whether the enhancement suit was properly brought or not, its institution was certainly an admission that Gora Chand had a right of occupancy." The Judge further observed: "There may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."

* * * *

"In my opinion defendants have a right of occupancy in the land, and cannot be ejected The land has been in their possession and that of their vendor and his family for about a century, and the conduct of the plaintiff in suing for enhanced rent shows that he knew the tenant had an occupancy right in it. It was leased out apparently for building purposes, and the tenant built houses and planted trees on it in accordance with the grant and on the faith of it."

The Judge accordingly reversed the decision of the Munsiff and dismissed the suit.

(1) I. L. R., 8 Cal., 960.

The plaintiff appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Bhobani Charan Dutt* for the appellant.

Baboo *Debender Mohun Sen* for the respondents.

The judgment of the Court (PIGOT and RAMPINI, JJ.) was delivered by

RAMPINI, J.—This is a suit for ejectment from an area of about half a bigha of land after service of notice to quit. The land has been found by both the lower Courts not to be agricultural or horticultural land. The lower Appellate Court remarks that "it is too small for such a purpose, it is in a town or suburb, and it seems always to have been used for trading or residentiary purposes." The Court of first instance gave the plaintiff a decree, but the lower Appellate Court has held that the defendants have a right of occupancy in the land in consequence of its occupation by their vendor and his family for about a century, and that, therefore, they cannot be ejected. The learned Additional District Judge cites the case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (1) as an authority for the view which he expresses, that "it is not only agricultural tenants that can plead occupancy rights, and that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants." But the case of *Gungadhur Shikdar* v. *Azimuddin Shah Biswas* (1) would seem to us to be no authority for such a proposition. All that is laid down in that case is that when land has been let, not for agricultural, but for building purposes, and when buildings of a substantial character have been erected on it for more than 60 years, and the defendant and his ancestors have been in occupation of it for that period, the Courts are at liberty to presume, if they think fit, that the original grant of the land was of a permanent character. Moreover, none of the rulings which have been cited in this case in any way support the view taken by the learned Additional District Judge. On the other

(1) I. L. R., 8 Cal., 960.

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hand, the contrary has been expressly held in the case of *Ramdhun Khan* v. *Haradhun Paramanick* (1), in which it has been said by Markby, J.: "It was stated that if a man (altogether independently of Act X of 1859, and even assuming that that Act would not apply) grants, we will say, a house to another for an indefinite term, the tenant, merely by occupation of it under that grant, acquires, on equitable principles (for that is what it comes to), a right for occupancy. I know of no such principle of law. If authority were needed, it seems to me that such a proposition of law was expressly repudiated by the decision of the Privy Council in a case reported in 11 Moore's Indian Appeals towards the end of the volume (2). I do not say that a grant, which was originally wholly indefinite in its terms, may not be made perpetual by the subsequent conduct of the parties, but that is a matter of fact, and no facts have been shown in this case of that kind, nor has the Court been asked to infer it. What we have been asked to hold, and what we cannot hold, to give the defendants what they ask, is, that simply by occupying under a grant for no specified period and by paying rent under it a tenant acquires a right of occupancy. I think that right is entirely confined to the special cases in which the Legislature has granted it." In no subsequent ruling has any other principle been laid down.

The learned Additional District Judge has not found that there is anything in the circumstances of this case, or the conduct of the parties, which would justify the inference that the lease originally granted to the predecessor of the defendants' vendor was of a permanent nature. He has abstained from coming to any such finding, and we think rightly so, for there would seem to us to be circumstances in the case which point to the opposite conclusion. In the *first* place, the defendants' kobala, dated 27th Bhadro 1274, recites that the land was held under a pottah dated 1229, and that the deeds relating to the land have all been made over by the vendor to the defendant No. 1. It is a most significant

(1) 12 W. R., 404: 9 B. L. R., 107 note.

(2) *Dhunput Singh* v. *Gooman Singh*, 11 Moore's I. A., 433 at p. 465.

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fact that the defendants do not produce this pottah, or attempt to account in any way for its absence. This conduct of theirs certainly lays them open to the imputation that they are purposely withholding this pottah, as it would have shown that their tenancy is not of a permanent character. *Secondly*, it is an undisputed fact in this case that the rent of the half bigha of land from which it is sought to eject the defendants has very recently been enhanced; so that no presumption in favour of the defendants from long occupation of the disputed land at a fixed and unvaried rate of rent can arise. *Thirdly*, the buildings on the disputed land are found to be but huts made of non-permanent and non-substantial materials, which can be easily removed. We therefore do not think that any presumption as to the permanent character of the original grant of the disputed land could fairly have been made in the case, or that there are any circumstances to negative the right of the landlord, as the plaintiff is admitted to be, to re-enter on the land after taking proper steps to determine the defendants' tenancy, as he has taken.

We therefore set aside the decree of the lower Appellate Court and restore that of the Court of first instance. This order carries costs in the suit in all the Courts.

C. D. P. *Appeal allowed.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Hill.

IN THE MATTER OF THE PETITION OF KOILASH CHANDRA CHAKRABARTY.

KOILASH CHANDRA CHAKRABARTY *v.* THE QUEEN EMPRESS. *

1889 *May* 20.

Penal Code (Act XLV of 1860), ss. 441 and 456—House breaking by night—Criminal Trespass—Intent.

When a stranger, uninvited and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of a woman, a member of a respectable household, and when an attempt is made to capture him uses great violence in his efforts to make good his

* Criminal Revision No. 163 of 1889 against order of J. G. Campbell, Esq., Session Judge of Mymensingh, dated the 2nd of February 1889, affirming the order of Baboo Bhuban Mohun Raha, Deputy Magistrate of Netrokona, dated the 31st of December 1888.

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escape, a Court should presume that the entry was made with an intent such as is provided for by s. 441 of the Penal Code.

An accused person in the middle of the night effected an entry into a house occupied by two widows, members of a respectable family. On an alarm being given, and an attempt made to capture him, he made use of great violence and effected his escape. Upon these facts he was charged with offences under ss. 456 and 323 of the Penal Code. The defence set up was an *alibi*, which was disbelieved by both the lower Courts. Neither Court found specifically what was the intention with which the accused entered the house, but it was suggested that it was probably for the purpose of prosecuting an intrigue with one of the women. There was no evidence that he had been invited by her to go there. The lower Courts convicted the accused under s. 456. It was contended that, as the prosecution had failed to prove that the entry was made with intent to commit any offence, the conviction was illegal.

Held that, under the circumstances of the case, the Court ought to presume that the entry was effected with such intent as is provided for by s. 441, and that the conviction should be upheld.

THE petitioner in this case was charged with house breaking by night in the premises of one Golak Mohun Mojumdar, and of voluntarily causing hurt to one Sarba Joya Debi under ss. 456 and 323 of the Penal Code.

The case as proved by the complainant and his witnesses was that he was awoke in the middle of the night by his cousin Sarba Joya Debi, calling out that there was a thief in the house, shaking the padlock of the *sindhuk*; that he rose and went out at once to the house in which Sarba Joya slept and found the accused coming out; that he thereupon seized him by his beard and a struggle ensued; that the accused bit him on the neck, and that on Sarba Joya coming out, and giving an alarm, the accused left him and hit her over the head with a *khota*, and then left the premises. The defence set up by the accused, who was the village doctor, was an *alibi*; but the Deputy Magistrate accepted the story of the prosecutor and disbelieved the *alibi*. The accused, by way of assigning a motive for a false charge being brought against him, alleged that the cousin of the complainant, a widow named Bhaba Sundari who slept in the same house as Sarba Joya, was unchaste, and that as he, the accused, had been interfering with her visitors, this charge had been got up against him.

The Deputy Magistrate came to the conclusion that the accused broke into the house and committed the assault charged, but that his object in breaking into the house was not theft, but probably something worse, suggesting thereby that his object was the prosecution of an intrigue with Bhaba Sundari. He accordingly convicted the accused on both charges and sentenced him to six months' rigorous imprisonment, and a fine of Rs. 25 on the first charge, and a fine of Rs. 50 on the second charge.

The accused then appealed to the Sessions Judge, and it was contended on his behalf that the conviction under s. 456 could not be sustained, inasmuch as, if he merely entered the house to prosecute an intrigue with Bhaba Sundari, there could be no criminal trespass, and the assault was committed outside the house and had nothing to do with the entry. The Sessions Judge however rejected that contention, and held that the conviction was right, as there was no evidence to show that the woman invited him or consented to his intrusion, and, when he was seized, he was guilty of extreme violence. The appeal was accordingly dismissed.

The accused then moved the High Court, under its revisional powers, upon the ground that the prosecution having failed to prove that he entered the house with intent to commit theft or any other offence, the conviction was bad.

A rule was issued which now came on for argument.

Baboo *Dwarka Nath Chuckerbutty* for the petitioner.

Mr. *Kilby* for the Crown.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

In this case the petitioner, Koilash Chandra Chakrabarty, was convicted by the Deputy Magistrate of Netrokona of the offences of house breaking by night and of voluntarily causing hurt under ss. 323 and 456 of the Penal Code, respectively, and sentenced to six months' rigorous imprisonment in respect of the first offence, and to a fine of Rs. 50 in respect of the second. He appealed to the Sessions Judge of Mymensingh, but his appeal was dismissed; and he now moves this Court to set aside the conviction and sentence under s. 456 of the Code on the

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ground that the prosecution failed to prove that he had entered the complainant's house with the intent to commit theft or any other offence.

In our opinion the conviction and sentence ought to be maintained. The facts are these: The complainant, who is apparently a person in comfortable circumstances, lives in a country village in a house which is divided into several distinct apartments. One of these he used himself with his wife and three young children to sleep in, and another was used for the same purpose by two widows, cousins of the complainant, the elder of whom was of advanced age, and the younger, whose name is Bhaba Sundari, a woman of about 20 years of age. On the night of the 12th Aughran, when the events out of which this case has arisen took place, there was no other occupant of the complainant's house but the persons I have mentioned. On that night a considerable time before daybreak, the complainant was awakened by his elder cousin, who told him that there was a thief in the house who was shaking the padlock of a *sindhuk* in his room. He got up and went out at once and found the petitioner forcing his way out of the ladies' room by pushing aside the *bera*. He seized the petitioner and a struggle ensued in the course of which the complainant was bitten by the petitioner, and the elder lady received a blow from him with a piece of bamboo which drew blood. The complainant, under these circumstances, charged the petitioner with having entered his house with intent to commit theft and with assault. The defence was an *alibi*, and the petitioner asserted that he had been falsely accused because he was supposed by the complainant to have interfered with the amours of the younger of the widows. The *alibi* has been disbelieved by both the Courts below, and there seems to be no ground for the aspersions cast on the character of Bhaba Sundari.

Neither of the Courts below has found in terms with what intent the petitioner entered the complainant's house. The Deputy Magistrate declined to believe that his object was theft, but thought that he might have been there for "some thing worse," by which, I presume, is meant the prosecution of an intrigue with the younger widow; but with reference to this aspect

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of the case the learned Judge, in disposing of the argument that the petitioner's act was not criminal as his entry was for the purpose of having connexion with Bhaba Sundari, remarks: "There is no evidence that the woman invited him in, or consented to his intrusion, and when seized he was guilty of extreme violence," and we should do wrong, were we, in the existing state of the evidence in the case, to assume, as we were invited to do by the pleader who appeared before us on behalf of the petitioner, that the intrusion of the petitioner was less distasteful to Bhaba Sundari than to any other member of the complainant's household. The learned Judge refused to accept that view, and on that ground, as we understand his judgment, declined to disturb the conviction. What we have then to deal with is the case of a man, a stranger, who uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when the attempt is made to capture him, uses great violence in the effort to make good his escape. Under such circumstances we think a Court ought to presume that the entry was effected with an intent such as is provided for by s. 441 of the Penal Code. This is the view upon which the learned Judge has acted, and we therefore think that his decision ought to be upheld.

Conviction upheld.

H. T. H.

Before Mr. Justice Prinsep and Mr. Justice Hill.

1889
May 13.

KEDARNATH DAS (PETITIONER) *v.* MOHESH CHUNDER CHUCKERBUTTY AND ANOTHER (OPPOSITE PARTIES).*

Criminal Procedure Code (Act X of 1882), *s.* 195—*Sanction to prosecute—Notice to accused—Revisional power, Exercise of, by High Court.*

When Subordinate Courts grant sanction to prosecute under s. 195 of the Criminal Procedure Code, it is incumbent on them so to frame the proceedings before them as to enable the High Court to satisfy itself from the record whether the application for sanction has been properly granted or not.

* Criminal Motion No. 175 of 1889 against the order passed by Moulvie Abdul Jubber, Officiating Presidency Magistrate of Calcutta, Northern Division, dated the 11th of April 1889.

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A Magistrate, in disposing of a charge of theft, delivered the following judgment: "The charge of theft of doors and windows is not proved at all against the accused. They are acquitted."

There was no further record of the proceedings. Immediately on the judgment being delivered, the pleader appearing for the accused applied for sanction to prosecute the complainant under ss. 182 and 211 of the Penal Code. The Magistrate refused to hear the application then, on the ground that it was not the proper time fixed by him to hear applications.

The attorney for the complainant, who had expressed his willingness to have the application heard and disposed of there and then, intimated that he was prepared to show cause why sanction should not be granted, and asked that notice of any future application might be given to the complainant. The accused renewed the application the following day without notice to and in the absence of the complainant or his attorney, and the Magistrate granted the sanction asked for.

On an application to the High Court to revoke the sanction: *Held*, that the Magistrate did not exercise a proper discretion under the circumstances in neglecting to give the complainant notice of the application, and an opportunity of being heard.

Held, further, that the mere fact of the charge laid by the complainant not having been proved, was not in itself sufficient ground for granting sanction to prosecute him under ss. 182 and 211 of the Penal Code, and as, beyond the judgment of the Magistrate, there was nothing on the record to show that there were sufficient grounds for granting the sanction, it should be revoked.

THE facts which gave rise to this application were as follows:—

The petitioners, Kedarnath Das and his brother, were, according to the allegation of the petitioners, the owners of the southern portion of No. 6 Bholanath Coondoo's Lane in Calcutta, which had been allotted to them under a decree for partition passed by the High Court in its ordinary original civil jurisdiction. In an affidavit filed in support of his application Kedarnath Das stated that in the Bengali year 1293 (1886-87), Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, the opposite parties, who were their purohits, requested him and his brothers to allow them to reside in the portion of the second premises so allotted to them, promising to vacate as soon as they were asked to do so, and that he and his brother allowed them to reside there.

In his affidavit he went on to state that on the first day of March he called on the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, and informed them that the house

was badly in need of repairs, and that he and his brothers wished to repair the same and desired them to leave the house as soon as possible, and he placed two of his servants, Jooman and Hem Raj, in the house.

That on the 5th March, having received information that the said Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty had ordered his servants to leave the house, he called there and met Nobo Coomar Chuckerbutty, who threatened to break his head if he entered the house, but that he entered the house and told his servants not to leave it, and finding that the sudder-door was wholly out of repair and about to fall in pieces, he removed the same to his dwelling-house.

That on the 9th March, having received information that his servants had been turned out of the said house, he called there, and on seeing him Nobo Coomar Chuckerbutty left the house and proceeded towards the direction of the Burtollah thannah. That he went into the house and found that the cook-room had no door, and certain doors and windows, which he had stored in one of the godowns, were missing, and he found a carpenter employed in sawing certain rafters. Seeing this he went to the thannah and informed the jemadar of what had happened, and thereupon the jemadar wrote something in a book and desired him to put his signature thereto, which he did.

That thereafter and on the same day a jemadar of police went to the house, but he did not make any enquiries into the petitioner's charge, while he made certain enquiries into a certain complaint preferred by Nobo Coomar Chuckerbutty against the petitioner, and made him produce the sudder-door which he had removed on the 5th March, but which did not in any way relate to the subject-matter of his complaint. Thereafter, the Inspector of the thannah reported to the Deputy Commissioner of Police that the petitioner's complaint was a false one, whereupon he directed the Inspector to prosecute him. Subsequently, at the instance of the said Inspector, a summons was issued against him.

That on the day of the hearing of the said complaint, he appeared in the Calcutta Police Court with his attorney, Baboo Kali Nath Mitter, who informed the Hon'ble Syed Amir Hossein,

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the Magistrate of the Northern Division of Calcutta, of the circumstances under which the complaint was made, and the action taken by the police, and that there was no judicial enquiry as to the truth or otherwise of the said complaint; thereupon the said Magistrate ordered summons to issue against Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty, on the complaint preferred by the petitioner, and, accordingly summonses were issued against them, returnable on the 10th day of April instant.

That on the 10th day of April, the petitioner appeared with his attorney, Baboo Kali Nath Mitter, before Syed Abdul Jubber, who was officiating as Presidency Magistrate, and his attorney explained to the Magistrate the circumstances under which the case was placed before him, and in support of the petitioner's complaint, his attorney examined him and his brother Amrita Lal Das and also Luckhimoney, Koosum, Hurry Mati, Falgu Mistry and Netto Lall Chunder, as witnesses, but the Magistrate did not take any notes of their evidence, and after the case for the prosecution was closed delivered his judgment.

That he and his witnesses proved the existence of the doors and windows in the house at the time when Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty were in possession of the same, but that he could not give and did not attempt to give any evidence of the taking thereof by Nobo Coomar Chuckerbutty and Mohesh Chunder Chuckerbutty or either of them.

That after the defendants were discharged, their pleader, Mr. Cranenburgh, applied to the Magistrate for sanction to prosecute him, when the Magistrate stated that he would not hear any application then, as it was not the proper time to hear applications. That his attorney then and there requested the Magistrate not to grant any sanction without notice to the petitioner, when the said Magistrate stated that, when the application for sanction was made to him, he would then consider whether he would issue any notice or not.

That thereafter on the 11th of April, the Magistrate, without any notice to the petitioner or his attorney, granted sanction for the prosecution of the petitioner.

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The judgment of the Magistrate, delivered on the 10th of April, was as follows:—

"*Kedarnath Das* v. *Nobo Coomar Chuckerbutty* and *Mohesh Chunder Chuckerbutty*.

Decision:

"The charge of theft of doors and windows is not proved at all against the accused. They are acquitted.

(Sd.) ABDUL JUBBER,
Offg. Presidency Magistrate."

The sanction granted by the Magistrate on the 11th April was in the following terms:—

"Sanction is hereby given to Mohesh Chunder Chuckerbutty and Nobo Coomar Chuckerbutty, under s. 195 of the Criminal Procedure Code, to prosecute Kedarnath Das, under ss. 211 and 182 of the Penal Code, for having, on the 25th March last, in the said Court, with intent to cause injury to the said complainants, instituted a criminal proceeding against them, and falsely charged them with having, on the 9th March last, in Bholanath Coondoo's Lane, committed theft of two pairs of doors two windows and 25 rafters, knowing that there was no just or lawful cause for such proceeding or charge.

11*th April* 1889.

Prosecution sanctioned.

(Sd.) A. J.

11*th April* 1889.

Issue summons, ss. 182 and 211.

(Sd.) A. J."

On the 26th of April, Mr. *M. P. Gasper* applied to the High Court (MACPHERSON and RAMPINI, JJ.), for a rule, calling on the Presidency Magistrate and the opposite parties to show cause why the order granting the sanction should not be set aside and the sanction revoked, and a rule in these terms was granted.

The application was based on a petition and affidavit of Kedarnath Das setting out the above facts.

The rule now came on to be heard.

Mr. *M. P. Gasper* and Babu *Kali Nath Mitter* in support of the rule for the petitioner.

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Baboo *Mohun Chand Mitter* for the opposite parties.

The judgment of the High Court (PRINSEP and HILL, JJ.) was as follows :—

This is a rule issued on an application made by the petitioner for the revocation of a sanction granted by the Presidency Magistrate of the Northern Division of the Town of Calcutta under s. 195, Code of Criminal Procedure, to prosecute him under ss. 182 and 211, Penal Code, in respect of certain proceedings taken by him in the Court of that Magistrate. We have nothing really amounting to any record of the proceedings in that case beyond the judgment of the Magistrate to the effect that "the charge of theft of doors and windows made by the petitioner was not proved at all against the accused." It appears that after the dismissal of that case, an application was made for sanction to prosecute the petitioner Kedarnath Das, in the presence of his attorney, and that the Magistrate declined to hear that application at once, and stated that it should be made at the hour fixed by him for the hearing of such applications. This order, we are told, was made, although the attorney for the petitioner Kedarnath Das expressed his willingness to have the application then heard in his presence, and intimated that he was prepared to oppose it. The application, it seems, was subsequently renewed in the absence of that attorney and granted.

Now, although it has been recently held by a Full Bench of this Court that service of notice before a sanction is given under s. 195 is not absolutely necessary, still, under the circumstances stated, we think that the Magistrate did not exercise a proper discretion in neglecting to give the other side through his attorney an opportunity of being heard, especially after he had intimated that he was prepared to oppose that application; and, further, we think that the Magistrate did not exercise a proper discretion because, so far as we can learn the facts of this case, he should not have readily granted the sanction asked for. Under s. 195, a discretion is granted to us to revoke any sanction which may have been granted by any authority, such as a Presidency Magistrate of Calcutta, subordinate to us, and therefore the law imposes upon us a responsibility in such matters to consider

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whether the application has been properly granted or not. It is therefore incumbent upon the Subordinate Courts so to frame the proceedings before them as to satisfy this Court as a Court of revision. In the present case we have absolutely nothing before us except the judgment of the Magistrate recording that the charge preferred by the petitioner Kedarnath was not proved. Now, the fact that that charge was not proved was in itself no sufficient ground for granting the accused in that case permission to prosecute the complainant with having intentionally and falsely charged him with such offence. Under such circumstances, we think that there were no sufficient grounds for granting the sanction to prosecute the petitioner, and that that order should accordingly be revoked.

H. T. H. *Rule made absolute.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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IN THE MATTER OF BICHITRANUND DASS AND OTHERS (PETITIONERS) *v.* DUKHAI JANA (OPPOSITE PARTY).*

1889 *May* 20.

Jurisdiction of Criminal Court—Tributary Mehals—Kheonjur—"Local Area"—Code of Criminal Procedure (Act X of 1882) ss. 182 *and* 531.

The Penal Code and Criminal Procedure Code have no application to the Tributary Mehal of Kheonjur which is on precisely the same footing in that respect as Mohurbhunj.

Certain persons, officers of the Maharajah of Kheonjur, one of whom was a resident of the Cuttack district, and the others residents of Kheonjur, were charged before the Deputy Magistrate of Tajpore with certain offences under the Penal Code. They were convicted, and on appeal to the Sessions Judge, the conviction was upheld. It was found by the Sessions Judge that the scene of the occurrence which gave rise to the charges was within the Territory of Kheonjur.

Held, that the Deputy Magistrate and Sessions Judge had no jurisdiction to try the case, and that the conviction must be set aside.

* Criminal Motions Nos. 4 and 6 of 1889 against the order passed by J. B. Worgan, Esquire, Sessions Judge of Cuttack, dated the 27th of September 1888, modifying the order passed by J. S. Davidson, Esquire, Deputy Magistrate of Tajpore, dated the 6th of February 1888.

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Held, further, that ss. 182 and 531 of the Criminal Procedure Code had no application to the case.

The words "local area" used in s. 182 only apply to a "local area" over which the Criminal Procedure Code applies, and not to a local area in a foreign country or in other portions of the British Empire to which the Code has no application; and similarly s. 531 only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure.

THE only question raised at the hearing of these two rules was whether the Deputy Magistrate of Tajpore and the Sessions Judge of Cuttack had jurisdiction to try the accused for offences which were alleged and found by the Sessions Judge to have been committed in Kheonjur, a tributary mehal adjoining the district of Cuttack.

The facts of the two cases were practically identical, the principal accused person in both cases being Bichitranund Dass, one of the officers of the Maharajah of Kheonjur, and it is sufficient for the purpose of this report to state the facts which gave rise to the issue of the rule in the latter of the two motions.

The prosecution alleged that Bichitranund Dass, who was the peshkar of Anundpore, accompanied by the other accused, all servants of the Maharajah of Kheonjur, came with a large number of men on to lands situate in Sukinda, which is within the district of Cuttack and within the jurisdiction of the Sub-divisional Magistrate of Tajpore, and proceeded to break *mokha* from the *baris* of Dukhai Jana and others, to cut dhan on the lands, and also to cut a *dhandi* which served as a boundary or line of demarcation between Sukinda and Kheonjur. Thereupon certain men of Sukinda came up and protested against the trespass, and this resulted in some nine of the latter being seized by Bichitranund and the other accused and taken off to Anundpore in Kheonjur when they were taken before the Manager. That official sent them down to be tried by the Sub-divisional Magistrate of Tajpore by whom they were discharged. It was alleged by the Sukinda people that they were cutting their *sua* crops on their own land and that their crops were carried off by the Kheonjur party.

After the nine men had been discharged, a complaint was made before the Deputy Magistrate of Tajpore against Bichitranund and the others charging them with offences under

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ss. 147 and 342 of the Penal Code. The principal question raised in the case was whether the scene of the occurrence was situate within Sukinda or Kheonjur, and on behalf of the accused it was contended that, as the occurrence took place in Kheonjur, the Court had no jurisdiction to try them. The Deputy Magistrate found that Bichitranund, being a resident of Sukinda, and therefore a British subject, was liable to be tried by him, whether the occurrence took place in Kheonjur or not.

Upon the principal question he found that the *sua* lands claimed by the Sukinda people were actually in their possession and formed part of Sukinda; that the accused entered upon their lands with intent to deprive the Sukinda people of them; that they also entered the *baris* of Dukhai Jana and others and committed certain acts of violence therein, such as trampling down the hedges, breaking the *mokha* crops, and cutting the *dhandi;* and that they arrested nine Sukinda men within the limits of Mulasar Mouza in Sukinda and therefore in British territory.

Upon these findings he convicted the accused of offences under ss. 147 and 342 of the Penal Code and fined Bichitranund Dass Rs. 300, Karmokar Patnaik Rs. 100, and the other accused Rs. 20 each with an alternative of one month's rigorous imprisonment each. He further directed all the accused to execute bonds in various sums to keep the peace for a period of three years.

Against that conviction Bichitranund Dass and Karmokar Patnaik appealed to the Sessions Judge, who upheld the conviction but reduced the amount of the fines.

The material portion of the judgment of the Sessions Judge was as follows:—

"The facts of this case are fully stated in the judgment of the lower Court. The allegation of the prosecution is that the riot was committed in the "*baris*" or homesteads of certain ryots in Mouza Mulasar in Sukinda, in the jurisdiction of the Sub-divisional Magistrate of Tajpore in the district of Cuttack, by the appellants and others, of whom the appellant Bichitranund is a man of the Cuttack district, whilst the appellant Karmokar is a man of the Kheonjur territory.

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The wrongful confinement or seizure of the complainant and his companions is also alleged to have occurred in or close to the said *baris*. About this the Deputy Magistrate was not satisfied, he being of opinion that the arrests were made on the *sua* lands, the cutting of the crops on which led to the same. From these lands he thought the Mulasar men were taken by the appellants to the "Gat" or cattle-fold near the *baris*. He did not pass separate sentences for the riot and the wrongful confinement, but for the two offences jointly. * * * * The case for the appellants is that they were not present, but Bichitranund says that the *sua* lands are not in Mulasar but in Chanchaniapal, a mouza in Kheonjur, adjoining Mulasar, and the arrest was admitted by certain of his co-accused in the case on that ground, it being their allegati on that it was effected on the *sua* lands, the distance of which from the *baris* is stated to be a quarter of a mile or something less. The exact position of these fields might, I think, have been with advantage ascertained and shown on a sketch-map, it being a matter of importance to know their distance from the *busti* of Mulasar, as well as from the nearest *busti* in the Mouza Chanchaniapal." [The Judge then proceeded to go into the geographical position of the *sua* lands and other facts immaterial for the purpose of this report, and came to the conclusion that it had not been proved by the prosecution that the *sua* lands were in Sukinda.] He then continued :—

"We are now brought to the other part of the case, *viz.*, the seizure in the *sua* fields, and to the question of jurisdiction, the first point being whether the Penal Code is or is not applicable to the case. It was said for the appellants it is not, because Kheonjur is not in British India. It was said for the prosecution that this statement is incorrect and that Kheonjur is not out of British India, it being under Regulation XII of 1805 a part of Zillah Cuttack. Reference was made for the prosecution to the cases of *Hursee Mohapatro* v. *Dinobundo Patro* (1), and *The Empress* v. *Keshub Mohajan* (2), the latter being a Full Bench case deciding that Mohurbunj is not in British India. The question of the other Tributary mehals being or not being in British India was not settled by that case, special features being found in respect

(1) I. L. R., 7 Cal., 523. (2) I. L. R., 8 Cal., 985.

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of Mohurbunj. The view taken on the general question would, I think, not support a finding that the Tributary mehals are not within the limits of British India, and I shall proceed on the view that they are within those limits, and that Kheonjur is so situated and thus is not to be regarded as a foreign state under the Extradition Act of 1879. At the same time, I do not consider that the Penal Code can be held to be in force in Kheonjur, inasmuch as the exemption thereof from the Regulation Criminal Law given to this mehal by Regulation XIII of 1805 was not annulled by the Penal Code. What law is in force in Kheonjur does not appear. Criminal jurisdiction is exercised by the Superintendent as a Sessions Judge, and by the Magistrates of Cuttack, Balasore, and Puri, as Assistant Superintendents; and in a Mohurbunj case tried by me at the May Sessions at Balasore, it was stated that the spirit of the Codes was followed in Mohurbunj, and this is no doubt true of the other Tributary mehals.

"Taking it that if the arrest occurred at a place in which the Penal Code, and equally the Criminal Procedure Code, were not in force, the question of jurisdiction demands settlement, it will be well to see how the matter of *venue* stands. If the *sua* fields be held to be in Sukinda, both of the appellants were, and are, liable under s. 2 of the Penal Code. All that the one of them who belongs to Kheonjur could claim might be to make an objection as to the matter of his arrest by calling himself a subject of a foreign state. but as I have already held Kheonjur not to be a foreign state, no plea of this kind can be entertained. The question is thus only whether Mr. Davidson's decision in the matter of *venue* was justified. It was said for the appellants that it was not, as he made no attempt to re-lay the boundary line as shown by the map to which his decision may very possibly be contrary, and that in acting as he did he assumed a power which is by law vested in the Superintendent and no one else, *viz.*, by Act XX of 1850. I have already shown that the dispute would appear to have involved a very nice question as regards position, and I think myself that this question demanded a more accurate method of determination than that which was adopted by Mr. Davidson, which seems to have left the point

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in doubt. The fact of the Mulasar men having held the fields would not give the Deputy Magistrate jurisdiction and was hardly relevant to the issue, the position of the lands being one to offer temptation for encroachment. I think that it was a matter in which the onus was on the prosecution and that it was not met. I do not think that I can properly uphold the finding that the *sua* fields are within Sukinda and not in Kheonjur. The point is open to doubt, and of this doubt I think the appellants can claim the benefit.

"It being now held that the scene of the arrests was not proved to be in Sukinda, and that if in Kheonjur, it was in a place not under the operation of the Penal Code, though in British India, the question is how did Mr. Davidson's jurisdiction stand? As regards the Kheonjur appellant Karmakar Patnaik, I do not think that he is, under the view taken by me, differently placed from the other appellant, who is a man of Cuttack. If Kheonjur is in British India, he is as much a native Indian subject of Her Majesty as is Bichitranund. It cannot however be said that s. 188 of the Criminal Procedure Code would apply, nor was it contended. Section 531 was the section on which (with s. 182) the prosecution relies as making the conviction legally sound; and it was urged that the case was one capable of inquiry and trial within either the local area of Sukinda, *i.e.*, Tajpore or of Kheonjur, the latter of which is, it was said, a Sessions division existing at the time of the passing of the present Criminal Procedure Code. Under s. 182, if it was uncertain in which of the areas the offences were committed, it was, it was argued, open to the prosecution to proceed in either the Tajpore Magistrate's or in the Superintendent's Court, and either Court could enquire into and try the case. Against this it was said that Kheonjur cannot be considered to be a 'local area' within the meaning of the Code, and that the alternative procedure was thus not open as contended.

"As to this matter, I do not find any definition of the phrase local area' in the law. The point came before me for consideration in the Mohurbunj trial alluded to, and the view that I then took of it was that 'local areas' meant areas within British India. It was said that they are not this, but areas within

which the Criminal Codes are in force, and as the Penal Code is not in force in Kheonjur it cannot be held to be a local area. I was not shown any authority for this restricted view of the words 'local area,' and I should not in the absence thereof be disposed to alter the view adopted before. I think that the law is not contravened thereby.

"I thus think that Mr. Davidson was not without jurisdiction as regards either of the appellants, as respects what they are alleged to have done at the *sua* fields, and that as he had jurisdiction he was justified in applying the Penal Code.

"I have not said anything as to the objection of Mr. Davidson's re-laying or defining the boundary being, as alleged, *ultra vires* or not, because on the view taken by me this point of law need not be gone into. My attention was drawn by Baboo H. B. Bose to a judgment of Mr. Macpherson of the 23rd of May 1877 in R. A. No. 116 of 1875, *Bamadev Bhramachari* v. *Dasrathi Nack*, showing that it was held by him that a Civil Court could not settle its own jurisdiction against a Tributary mehal, and I should doubt whether a Magistrate could do so any more. But if s. 182 applies, the Deputy Magistrate's action in this respect is of no importance as regards the conviction.

"I may say that even if the *sua* fields were in Kheonjur, I consider it could not be held that there was no offence, if the application of the Penal Code was legal. The right of private defence would not justify what the appellants did.

"An objection was made that a request made for recall of the witnesses for further cross-examination on the 19th of December was disallowed, as also a repetition of the request made on the 9th of January. Looking at the cross-examination which had preceded this petition, and the nature of the evidence, which indicated clearly enough the charge which was made after it was concluded, I do not think that the Deputy Magistrate was wrong in refusing the application, and I do not think that anything could be gained by a remand now. I should thus not interfere on this ground. The conviction is accordingly upheld, as also the order for security, and the appeal to this extent dismissed. In view however of the uncertainty of the

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real position of the land, I think the sentence is capable of mitigation, and I reduce it in the case of appellant Bichitranund to Rs. 200, and of Karmokar to Rs. 60 fine, in default the term of imprisonment to be as ordered by the lower Court."

Against the order of the Sessions Judge, the petitioners moved the High Court, and a rule was issued which now came on for hearing.

Baboo *Mohesh Chandra Chowdhry*, Baboo *Umbica Churn Bose*, Baboo *Abinash Chandra Banerjee* and Baboo *Karuna Sindhu Mukerjee* for the petitioners.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The application was based on a petition setting out the above facts, and the principal grounds upon which it was contended that the decisions of the lower Courts were erroneous and the conviction bad were as follows :—

1. That the Courts below were wrong in holding that the territory of Kheonjur, which is a Tributary state, formed part of British India.

2. That the Sessions Judge ought to have held that the order of the Deputy Magistrate was liable to be quashed for want of jurisdiction.

3. That the Sessions Judge was wrong in holding that under s. 182 of the Criminal Procedure Code, the Deputy Magistrate of Tajpore had jurisdiction to try the case even if the "*sua* land" were held to be within the territory of Kheonjur.

4. That the interpretation put upon the phrase "local area" in s. 182 of the Criminal Procedure Code by the lower Court was not correct, and that that section had no application to the case.

5. That the Sessions Judge ought to have held that the Deputy Magistrate had not the power to assume jurisdiction against a tributary mehal.

6. For that the *sua* lands having been found to be situate within the Kheonjur state, and that the complainant and the people of Sukinda were taking crops from the said land, the

Court below ought to have held that the petitioners were justified in arresting the trespassers and taking them to the Sub-divisional Officer, and that there was no offence within the meaning of s. 342 or under s. 379 of the Penal Code.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

In this case we think it clear that the conviction cannot stand. The alleged offence was unquestionably and admittedly, if it was committed at all, committed within Kheonjur. Now there seems to be no question that Kheonjur and Mohurbunj are tributary mehals standing exactly upon the same footing with regard to their relations with the British Government and their independence. This is apparent from the treaty engagements executed by the Rajahs of these respective territories which are set out at pages 184 to 187 of the 1st volume of Aitchison's Treaties. A comparison of these two engagements shows that they are practically identical in terms, and the learned counsel who appears for the Crown has not disputed that proposition. Now this place, Kheonjur being in this respect the same as Mohurbunj, we have to consider the effect of the Full Bench case *The Empress* v. *Keshub Mohajan* (1), and the cases that gave rise to that reference to the Full Bench. There is no doubt of this, that the result of the Full Bench case and the other cases is this, that whether Mohurbunj was a foreign territory or not, the Criminal Procedure Code and the Penal Code had no application to it. It therefore follows by parity of reasoning that in the case of Kheonjur these Codes have no application. This proposition also was not disputed by Mr. Kilby who appears for the Crown. Mr. Kilby very properly pointed out his position, and told us that he found it was impossible to support the judgment in the face of these considerations. That being so, and these Codes not applying, it follows that the Magistrate before whom this case first came for decision, and the Sessions Judge to whom an appeal was made from the decision of the Magistrate, had no jurisdiction to try the case. It follows also that the Sessions Judge was wrong in his judgment where he considered that s. 182 of the Criminal Procedure Code applied. That section clearly does not

(1) I. L. R., 8 Cal., 985.

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apply for two reasons. In the first place the words "local area" in that section must mean a local area over which this particular Code applies, and it would not refer to a local area in a foreign country, or in a portion of the British Empire to which this Code has no application. The whole purport of the section makes that clear. Then again that section in reality intends to provide for the difficulty which would arise where there is a conflict between different areas, in order to prevent an accused person getting off entirely, because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. Each portion of the section refers to this conflict. The Sessions Judge finds as a fact that this particular offence was committed in this local area of Kheonjur, and it is impossible to find from his judgment with what other local area that local area in Kheonjur conflicts. For this reason also s. 182 has no application to the present case. The other section to which the Sessions Judge refers, *viz.*, s. 531, is equally inapplicable. That section, of course, only refers to districts, divisions, sub-divisions and local areas governed by the Code of Criminal Procedure, and for similar reasons it does not apply. In our opinion the place where the offence is said to have been committed was not within the jurisdiction of the Magistrate or of the Sessions Judge.

For these reasons we think it is quite clear that the judgment is wrong. We set aside the convictions and direct that the fines, if realised, be refunded.

H. T. H. *Rule made absolute and conviction quashed.*

PRIVY COUNCIL.

P. C.* 1888 November 15th, December 1st.

NANDI SINGH AND ANOTHER (PLAINTIFFS) v. SITA RAM AND ANOTHER (DEFENDANTS).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Gift—Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her to two donees, one of whom could not take.

A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter, being to modify the law otherwise prevailing, *viz.*, the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer.

Held, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow.

The gift was to the daughter and to her husband jointly. *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey* v. *Tayleur* (1), which, not depending on any peculiarity of English law, was applicable here.

APPEAL from a decree (7th July 1885) of the Judicial Commissioner, affirming a decree (10th June 1884) of the District Judge of Lucknow, which varied a decree (24th December 1883) of the Subordinate Judge of the Unao District.

The suit out of which this appeal arose related to a gift of a one anna and three pies share in a village, named Baboo Rajnan, in the Unao District, of the description generally termed "Zemindari," or jointly held by the proprietary body (2). The share had

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH and MR. STEPHEN WOULFE FLANAGAN.

(1) Ambler, 138.

(2) In these the co-parceners hold the whole village jointly in shares ordinarily determined by hereditary right, as distinguished from the ownership of shares in villages of another kind, shown by the area of the proprietor's possession.

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been owned by Sheo Baksh, who died in 1869 without issue, but leaving a widow Mussammat Bichan Kunwar, and a daughter Mussammat Mithan Kunwar. His nephews now claimed his share, and the principal question raised was, whether under the authority of the wajib-ul-arz of the village, and in consequence of a gift made by the widow to her daughter, that daughter's daughter took in priority to the collateral heirs of the deceased Sheo Baksh.

The clause in the wajib-ul-arz, and the contents of the deed of gift of 7th March 1870, by Bichan Kunwar to Mithan Kunwar and her husband Sita Ram (the latter not taking under it) are stated in their Lordships' judgment. Mithan Kunwar died in 1878, leaving her husband surviving her, and he was the first defendant in this suit, the other being his daughter by Mithan Kunwar, named Maharaj.

The Subordinate Judge held that the gift was invalid as to Sita Ram, but valid as a gift in favour of Mithan to convey one-half to her; and that Mithan's estate descended to her daughter, Maharaj, under the terms of the wajib-ul-arz, which used the words, "*auiad pisri*" "*ya dukhtari.*"

On the plaintiff's appeal, the District Judge remanded the suit, directing that Maharaj, who had not till then been made a party, should be joined, and adding an issue as to the effect of the deed of gift of 7th March 1870 in favour of Mithan in transferring the entire inheritance. The Subordinate Judge repeated his former decree.

The District Judge's judgment was, that he found no specification of shares in the deed of gift, and though invalid as to Sita Ram, it passed the entire property to Mithan. In regard to possession which should have followed, he held that an application presented by Bichan Kunwar for mutation of names in favour of Mithan, alleging that she had given her possession, was sufficient evidence of possession given in Bichan Kunwar's lifetime. He therefore dismissed the suit with costs.

The Judicial Commissioner's judgment, after a short summary, was as follows :—

The main contention in appeal is, that the deed of gift of 1870, not having been followed by a transfer of possession during the donor's lifetime, is invalid according to Hindu Law.

The lower Courts however concur in finding that there was a transfer of possession during the life time of Mussammat Bichan Kunwar. The Court of First Instance has found that Mussammat Mithan Kunwar and her husband Sita Ram lived with Mussammat Bichan Kunwar, and that Sita Ram managed the estate on behalf of the family. Under these circumstances it is difficult, if not impossible, to ascertain the truth as to actual possession. It is however on the whole presumable that Mussammat Bichan did make over the estate to her daughter before her death. If the deed of gift were invalid by reason of Mussammat Mithan Kunwar's not having obtained possession during her mother's lifetime, and if she (Mussammat Mithan Kunwar) had no right of inheritance, the conduct of the plaintiffs appellants in acquiescing for nine years in her usurpation is inexplicable.

It is further contended that under the terms of the wajib-ul-arz the widow could not create any interest beyond her own lifetime. This no doubt is the ordinary Hindu Law, but it is clear that this is not the intent of the wajib-ul-arz, which I consider has been rightly interpreted by the Courts below, as giving the widow power to create an absolute estate in favour of the daughter, or daughter's son, of the original owner.

I further concur with the District Judge that the deed of gift, though invalid as regards Sita Ram, was a valid conveyance of the whole share in favour of his wife, Mussammat Mithan Kunwar, the daughter of Sheo Bakhsh. I therefore affirm the decree of the lower Appellate Court, and I dismiss the appeal with costs.

On this appeal, Mr. *J. D. Mayne* and Mr. *J. H. W. Arathoon*, for the appellants, regard being had to the finding of the Courts below in succession, as to the question of possession by Mithan, proceeded to other points in the case. It was argued that the judgments to the effect that under the wajib-ul-arz and the deed of gift, an absolute estate of inheritance descending to her own daughter was created in favour of Mithan, were wrong. How far the wajib-ul-arz had the effect of altering the law was open to question, it being merely part of the settlement record, and though entries were presumed to be true under ss 16 and 17 of the Oudh Land Revenue Act (XVII of 1876), it might be erroneous as in the case of *Uman Parshad* v. *Gandharp Sing* (1). At all events, the words must receive a reasonable construction, and one could be placed on it that did not conflict with the plaintiff's claims. It could hardly be that the widow could give an

(1) L. R., 14 I. A., 134; I. L. R., 15 Calc., 20.

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estate of inheritance which she did not herself possess. And that the words translated, "descendants," meant such descendants as were heirs, rather than that they should allow a daughter's daughter to come in as an heir, was the better construction. If moreover the wajib-ul-arz had authorized a certain exclusion of collaterals in favour of female heirs in a direct line, the gift of 1870 had not proceeded correctly upon the power given. The deed was invalid, at all events, as regarded one of the two donees, and formed but an ineffectual attempt to do more than create an estate for the life of Mithan Kunwar. If it could be taken to be intended to give a joint estate for the life of the daughter, or of both, with survivorship between them, it failed in both cases on the death of Mithan, and the right to inherit the share of Sheo Baksh belonged to his collateral heirs. The gift could not be treated as conferring upon Mithan an estate different from that which had been intended by the donor. Reference was made to *Harvey* v. *Stracey* (1), *Re Farncombe's Trusts* (2), *Re Brown's Trusts* (3).

The respondents did not appear.

Their Lordships' judgment was afterwards delivered, on 1st December, by

SIR R. COUCH.—The appellants in this case are the grandsons of one Fatteh Singh, who had two sons, Sardar Singh, the father of the appellants, and Sheo Baksh. The latter married Bichan Kunwar, and died on the 20th April 1869, without leaving any male child. They had a daughter Mithan Kunwar, who was married to Sita Ram, the first respondent. Mithan Kunwar died on the 18th March 1878, leaving a daughter Mussammat Maharaj, the second respondent. Bichan Kunwar died on the 26th March 1874. The suit was brought on 28th September 1883 by the appellants, to recover possession of land in the village, Baboo Rajnan, Pergunnah Harha, District Unao, which was the share of Sheo Baksh in the property inherited by him and his brother, the plaintiffs claiming to be his heirs according to Hindu law, and entitled to succeed to his estate on

(1) 1 Drew, 117. (2) L. R., 9 Ch. Div., 652.
(3) L. R., 1 Exch., 74.

the death of his widow. It was not disputed that the plaintiffs would be entitled if the ordinary law was applicable. The defence was rested upon a custom of the village of Baboo Rajnan as to the right to inheritance, and a deed of gift, dated the 7th March 1870, executed by Bichan Kunwar.

The wajib-ul-arz, which governs the right of succession to the property in dispute, is as follows:—

"*Extract from wajib-ul-arz, of village Baboo Rajnan, Pergunnah Harha, paragraph 4, of right to inheritance.*

"The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several children over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance."

The intention appears to be to modify the Mitakshara law which prevails in Oudh by enabling a sharer in family property or his wife to alter the course of succession by introducing a daughter or daughter's son, and their descendants, male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of "descendants" to children, as where they are intended, that word is used, and where a male is intended it is so said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not, as the appellants contended, limited to that interest. Both the lower Courts have understood "descendants" as meaning male and female in any degree.

On the 7th March 1870, Bichan Kunwar executed a deed of gift of the property in dispute to Mussammat Mithan and Sita Ram, the words of gift being followed by "I promise and agree

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"in writing that the donee may, from the date of execution of "this instrument, take proprietary possession similar to mine over "the gifted property. There has been left no claim right or dis- "pute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was, that the gift being invalid as regards Sita Ram was also invalid as regards Mithan. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Mussammat Mithan. Their Lordships are of this opinion: The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur* (1), Lord Chancellor Hardwicke said: "If an estate is limited to "two jointly, the one capable of taking, the other not, he who "is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is appplicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson & Beard.*

C. B.

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*P. C.** 1889 *February* 12, 13 *and* 16.

MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) *v.* MACNAGHTEN AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Res judicata—Code of Civil Procedure, s. 13—*Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.*

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed

* *Present:* LORD WATSON, LORD HOBHOUSE, AND SIR R. COUCH.

(1) Ambler, 138.

to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees' decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit, brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished, by having set off against it the rents which had already accrued, or might afterwards accrue, and for possession of the lands on the expiry of the lease:

Held, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exceptione rei judicatæ*.

Nor could the mortgagees be held to have purchased as trustees for the mortgagees, as suggested for the appellant, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser.

APPEAL from a decree (12th February 1886), affirming a decree (8th May 1884) of the District Judge of Tirhoot.

The suit, out of which this appeal arose, was brought by the proprietors of mouzas forming part of two taluks, Malik Alipur and Jonapur, in the Tirhoot District, which they had mortgaged to the defendants, who had caused the mortgaged villages to be judicially sold, themselves, by leave to bid granted by the Court executing their decree, becoming the purchasers. The question now raised was whether the mortgagors, notwithstanding the decree obtained against them, and the sales in execution, could now have an account taken of the mortgage debt, and have set-off in their favour, and against such debt, rents due to the mortgagors from the mortgagees; or whether, with reference to the law, as explained (Explanation II) under s. 13 of the Code of Civil Procedure, that any matter which might

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and ought to have been made ground of defence in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, precluded the mortgagors from now insisting on their right to set off the rents.

The decree which the mortgagees had obtained, upon the mortgage in the Court of the Subordinate Judge, was dated 18th January 1878, and was affirmed by the High Court on appeal on 22nd May 1879.

The appellant, Mahabir Pershad Singh, and his brother Kumla Pershad Singh (the latter now deceased, and represented by the other appellant, a minor), leased to the proprietors of the Khanpur Indigo Factory, Messrs. E. Macnaghten and R. Olpherts, six bigas, part of their shares in the taluks above-mentioned. Their shares, however, in 1867, were sold at a sale for arrears of revenue. This sale was subsequently set aside by a decree of the High Court, affirmed by Her Majesty in Council, in *Bunwaree Lall Sahoo* v. *Mahabir Pershad Singh* (1).

The relations between the parties are set forth in their Lordships' judgment.

The mortgage on which the decree of 1878 was obtained was executed on the 9th December 1871.

On the 15th September 1873, while Bunwari Lal's appeal was still pending, Mahabir Pershad and his brother executed an ikrarnama, agreeing with Macnaghten and Olpherts to grant them further leases, and to give them other land in a mokarari, should the sale for arrears be set aside. Afterwards, on or about the 21st June 1874, pottahs and kabuliyats were executed between them.

On the 29th June 1877, Macnaghten and Olpherts sued Mahabir Pershad and his brother on the mortgage of 9th October 1871, to recover Rs. 34,516. In that suit the defence was, that an express arrangement had been made, whereby the mortgagees were precluded from recovering, without the taking of accounts between the parties; and an issue was raised whether there had been an agreement between the parties that the factory, taking the usufruct of the mortgaged villages, should liquidate in that way what might be due to it. The Subordinate Judge, in his

(1.) L. R., 1 I. A., 89.

judgment of 18th January 1878, found that the arrangement alleged by the mortgagors had not been proved. He found that an adjustment of accounts between the parties had taken place on 31st December 1873, when the mortgagors were still indebted to the amount for which the mortgage was executed. The High Court affirmed this judgment on 22nd May 1879, observing that it had been proved that, on 31st December 1873, Rs. 25,000 were due on the mortgage, and that the alleged arrangement for rents to be set off had not been proved. The Judges also pointed out that the defendants, in their written statement, declared that the accounts and the sums due to them for rent were to be the subject of another suit, already filed. While that suit on the mortgage was pending, the mortgagors did in fact claim in another suit Rs. 4,475, rent due on a lease executed by Macnaghten and Olpherts on 21st June 1874. This claim was dismissed in the first Court, but on appeal, the High Court decreed the amount on 21st April 1881. Mahabir Pershad also obtained another decree on 30th June 1879 for Rs. 2,829, in a suit against the present respondents on other kabuliyats.

Meanwhile, the mortgagees enforced the decree on the mortgage; and at judicial sales on 15th September and 20th November 1879, the mortgaged property was sold; and the decree-holders, having previously obtained leave to bid, became the auction purchasers for about Rs. 20,000.

Afterwards the mortgagor, Mahabir Pershad Singh, applied, under s. 311 of the Code of Civil Procedure, to have these two sales cancelled, alleging irregularity and inadequacy of price realized at the sales. This application having been rejected on 25th September 1880, the order rejecting it having been upheld by the High Court was maintained by an order of Her Majesty in Council on 24th November 1882 in *Olpherts* v. *Mahabir Pershad Singh* (1).

In the present suit, instituted on the 24th November 1883, the plaint asked, that the sales of 15th September and 20th November 1879 might be declared fraudulent and inoperative as against the plaintiffs, whose position as lessors was not, it

(1) L. R., 10 I. A., 25; I. L. R., 9 Calc., 656, nom. *Macnaghten* v. *Mahabir Pershad Singh*.

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was contended, changed; and that it should be declared that the plaintiffs were entitled to have rent from the defendants in respect of the leases and mokarari, from the time of satisfaction of their decree by setting off the sums due to the plaintiffs from the defendants; and that it should be declared that, after the expiry of the term of the leases, the plaintiffs were entitled to have khas possession; also for such other relief as might seem just.

The suit was dismissed by the District Judge, and on appeal, the following principal question was thus expressed, and disposed of, in the judgment of a Division Bench, composed of Mitter and Norris, JJ.:—

The only ground upon which this appeal has been argued is this, that as on the dates of sale mentioned above, a large amount of money was due from the defendants to the plaintiffs, and as the defendants were the mortgagees, the sale should be declared as null and void, and that an account should be taken between the plaintiffs and the defendants of the moneys due to each other; and if on taking such account anything be found due to the plaintiffs, they should be allowed to sell the mortgaged property for the realization of the same.

The plaintiffs allege, that the amount of money which was receivable by them from the defendants falls into two classes: *First*, the rents of the disputed property which the defendants had in their hands, having been collected by them for the plaintiffs, after possession was taken of the property in dispute in accordance with the decree of the High Court, dated 31st January 1871; *second*, the rents due under the ticca pottahs executed in June 1874.

Now, we find that in the suit which was brought by the defendants upon the bond dated 9th October 1871, the plaintiffs, who were the defendants in it, set up in their written statement that the plaintiffs in that suit were not entitled to recover the amounts sued for unless an account were taken of the two classes of money due to them referred to above. In that written statement they based their defence upon this point upon an express contract between the parties.

In the opinion of the Court of First Instance as well as of this Court, which heard the case in regular appeal, this express contract was not established.

As regards the first class, this Court found that on an adjustment of accounts between the parties, which took place on the 31st December 1873, the plaintiffs in this case were found still indebted, to the extent of the money for which the bond of the 9th October 1871 was executed. Therefore, as regards this amount, it is no longer open to the plaintiffs to contend

that anything was due to them from the defendants. The learned Advocate-General contended, that although the express contract upon which the plaintiffs relied in the former litigation was not established in the opinion of the Courts which dealt with it, yet the plaintiffs are not precluded from relying upon the equity which arises upon the establishment of the fact that on the dates of the respective sales, the defendants were indebted to the plaintiffs on account of the rents due upon the lease executed in June 1874. He further argued, that this equity was not pleaded and dealt with by the Court in the former litigation.

We desire to guard ourselves from being understood to say that, in our opinion, any such equity as is put forward by the learned Advocate-General on behalf of the plaintiffs, does really exist, having regard to the facts stated in the plaint. But conceding this point in favour of the plaintiffs, it seems to us that the result of the former litigation precludes them from relying upon it. The suit upon the bond dated 9th October 1871, was brought to recover the money due under it by the sale of the mortgaged premises. In that suit the equity in question, if it really existed, would have been a valid defence. Therefore the decree which was passed in favour of the plaintiffs directing the sale of the mortgaged premises, precludes the plaintiffs from setting it up again in a subsequent litigation.

We are, therefore, of opinion that the ground urged before us in support of the appeal is not valid. We may notice here a decision cited before us in support of this ground of appeal, *Kamini Dasi* v. *Ramlochan Sirkar* (1). In that case, what was sold by the mortgagee was not the mortgaged property but simply the mortgagor's equity of redemption. There is, therefore, this essential difference between the facts of that case and the present, that in the former the mortgagee bought in the equity of redemption, while in the latter, the mortgagee brought a suit to enforce his mortgage lien, obtained a decree declaring his right to sell the mortgaged property in satisfaction of that lien, and after obtaining sanction of the Court, himself became the purchaser of the property brought to sale in execution of that decree.

The result is that this appeal will be dismissed with costs.

On the plaintiffs' appeal, Mr. *R. V. Doyne*, for the appellants, argued that, as the facts showed that, at the time of the sales in 1879 in execution of the decree upon the mortgage, the respondents were indebted to the appellants in respect of rents, and money had and received; it followed that it was inequitable that the respondents should be allowed to bring the mortgaged lands to sale without coming to an account, and also inequitable that they should become the purchasers. It was also argued, that inasmuch

(1) 5 B. L. R., 450.

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as the decision already given on the mortgage had dealt only with an alleged right of set-off under an express agreement, the appellants were not precluded from establishing facts that might disclose a right of set-off. It was not now alleged that there had been any express agreement to that effect, but it was contended that an equity resulted from the relations between the parties to have an account. Moreover, the respondents having themselves become the purchasers at the judicial sales, should be held under the circumstances to have purchased as trustees for the appellants, notwithstanding that they had purchased after obtaining an order giving them leave to bid.

Reference was made to the Transfer of Property Act (IV of 1882), s. 99, and to ss. 13 and 111 of the Code of Civil Procedure. *Kamini Debi* v. *Ramlochan Sircar* (1), and *Neerunjun Mookerjee* v. *Oopendro Narain Deb* (2) were cited.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

LORD WATSON.—In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The appellants, members of a joint Hindoo family, were owners of certain shares of 20 mouzas, in taluks Malik Alipur and Jonapur, which were sold, in that year, for arrears of Government revenue, to one Bunwari Lal. An action was brought by them to set aside the sale as irregular, which was dismissed in the District Court; but in January 1871 the High Court gave their decision in favour of the appellants, which was affirmed by this Board in December 1871.

The respondents held six of these mouzas in lease before the sale to Bunwari Lal. They were proprietors of an indigo factory in the neighbourhood, and they gave the appellants pecuniary and other assistance in their suit, in consideration of which the appellants, in April 1871, during the dependence

(1) 5 B. L. R., 450. (2) 10 B. L. R., 60.

of Bunwari Lal's appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the 20 mouzas to the respondents for Rs. 25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April 1875. The appellants were restored to possession in April 1871, after the judgment of the High Court in their favour. In September 1873, the parties entered into an agreement by which, in consideration of further assistance already given, and to be given them by the respondents, the appellants undertook, in the event of Bunwari Lal's appeal proving unsuccessful, to renew the lease of the six mouzas, to let to the respondents the remaining 14 mouzas under a ticca pottah for 15 years, and to grant them a mokarari lease of 13½ bigas, required by them for the extension of their factory. In February 1874, shortly after the dismissal of Bunwari Lal's appeal, the appellants executed a sunnud, authorizing the respondents to collect the rents of their mouzas for the year ending in September 1874, the respondents accounting to them, for their receipts, under deduction of costs and charges. In July 1874, the appellants, in terms of their previous agreement, renewed the lease of the six mouzas, at a rent of Rs. 645, for 15 years, from September 1874, and granted the respondents a ticca pottah, for the same period, of the remaining 14 mouzas, at a yearly rent of Rs. 3,527, subject to future adjustment. They also gave, as stipulated, a mokarari lease of the 13½ bigas.

These transactions between the appellants and respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The respondents began the strife, in June 1877, by bringing a suit upon their mortgage bond. At that date, they undoubtedly owed to the appellants a considerable sum, for past rents of the 20 mouzas, no part of which had been paid. The appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be

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set-off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was that, on their failure to establish the alleged agreement, the Subordinate Judge, in January 1878, gave the respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd May 1879. The respondents, in April 1878, sued for execution on the decree of the Subordinate Judge; but in consequence of its being appealed from to the High Court proceedings were stayed. The next step was taken by the appellants, who, in June 1878, raised two actions, one for the rents due in respect of the six and the other for the rents due in respect of the 14 mouzas. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April 1879, on the ground that the rent payable for the 14 mouzas had never been adjusted in terms of the lease; but the High Court, holding that it lay with the respondents to show what, if any, abatement ought to be made from the rent specified, on the 2nd April 1881 reversed his decision, and gave the appellants a decree for the amount of their claim, which was upwards of Rs. 15,000.

The judgment of the High Court in their mortgage suit having then become final, the respondents, in June 1879, revived the execution proceedings which they had instituted in April 1878. The mortgaged property was exposed for sale on the 15th September and 20th November 1879, when it was purchased in two lots by the respondents, who had obtained leave to bid from the Court, for Rs. 17,000. The regularity of the sale was impeached by the appellants, but their objections were over-ruled by the Subordinate Judge, and after being sustained in part by the High Court, were ultimately disallowed by this Board on the 24th December 1882.

Having thus failed to make good their statutory objections, the appellants, on the 24th November 1883, filed their plaint in the present suit, which prays to have the two judicial sales, of 15th September and 20th November 1879, set aside or treated as nullities; to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue; and for khas possession of the mortgaged property

after the expiry of the respondents' leases in 1889. The prayer was based upon two grounds: The *first*, which attributed the sales to undue influence and oppressive conduct on the part of the respondents, was abandoned in the High Court, and was not insisted on here. The *second* consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the respondents credited against the sums due by the appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the appellants rely did raise such an equity in their favour. The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the appellants to recover their property from Bunwari Lal, and to secure to the respondents re-payment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the appellants, in November 1883, to the effect of annulling the judicial sales of 1879.

Their Lordships entertain no doubt that the proper occasion for enforcing the equity, now pleaded, would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to which the appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of s. 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the appellants are therefore barred from insisting on it, *exceptione rei judicatæ*.

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It was argued by Mr. Doyne, upon the authority of a decision by Macpherson, J., *Kamini Debi* v. *Ramlochan Sirkar* (1), that the respondents must be held to have purchased as trustees for the appellants. The same argument, which is not raised in the pleadings, seems to have been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must bear the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the respondents: Mr. *S. G. Stevens.*

C. B.

(1) 5 B. L. R., 450.

SRINATH DAS (PLAINTIFF) *v.* KHETTER MOHUN SINGH AND OTHERS (DEFENDANTS).

*P. C.** 1888 *November* 16*th and* 17*th*, 1889 *February* 5.

[On appeal from the High Court at Calcutta.]

Limitation Act 1877, *Art.* 135—*Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of* 1806—*Transfer of Property Act* (*IV of* 1882).

A mortgage by conditional sale, before the operation of the Transfer of Property Act, 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by Art. 135 of Sched. II of Act XV of 1877.

This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect, on or before 31st March 1873, as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor, down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession.

In a suit brought in 1882 against these purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879: *Held*, that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under Art. 135, as against them.

The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH and MR. STEPHEN WOULFE FLANAGAN.

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APPEAL from a decree [18th November 1885 (1)] of the High Court, reversing a decree [17th June 1883] of the Second Subordinate Judge of the 24-Pergunnahs District.

This suit was brought by the appellant, the transferee of a mortgagee, against the mortgagor and twenty-eight other defendants, the latter holding distinct plots of the mortgaged property under purchases from the mortgagor. And the question was whether the suit as against these purchasers, now respondents, was barred, as being a suit brought for possession more than twelve years after the mortgagor's right to possession determined, under Art. 135 of Sched. ii of Act XV of 1877; or fell within Art. 147, allowing sixty years from the time when the mortgage money became due for the mortgagee's suit.

The plaint was filed on the 6th September 1882, after the Code of Civil Procedure of that year, and the Transfer of Property Act, 1882, had come into force; s. 2 of the latter Act repealing Regulations I of 1798 and XVII of 1806, relating to mortgages, their foreclosure and redemption, and the Act substituting its own provisions.

The mortgage deed, which was in the English form, was executed, on the 17th November 1865, by Huri Narain Dey to Shama Sundari Debi, of five holdings of land in the 24-Pergunnahs District, to secure Rs. 15,705, to be repaid with interest at 18 per cent. on 17th February 1866. Besides the usual powers to the mortgagee to enter upon default and to sell, there was a provision enabling Huri Narain Dey "to sell such portions of the mortgaged premises as he might be able to sell to such purchasers, and at such prices as he shall deem advantageous," with an agreement for "the release of the piece or pieces of land so sold from this mortgage." The deed was registered on the 23rd January 1866. Sales of portions of the mortgaged property then took place.

Shama Sundari, as mortgagee, on the 15th February 1872, petitioned the District Court, under Regulation XVII of 1806, ss. 7 and 8, to issue a notice of foreclosure to Huri Narain Dey, alleging that there was then due the sum of Rs. 28,777 on the mortgage. On the same day, the order was made "that the usual notice of one year, together with the copy of the petition,

(1) *Shurnomoyee Dasi* v. *Sreenath Dass*, I. L. R., 12 Calc., 614.

be served on the opposite party." No notice of these proceedings was served on any of the defendants in this suit, other than Huri Narain Dey, although they, with the exception of No. 29, purchased before the proceedings were taken. On the 31st March 1873, the Judge ordered as follows: "Whereas one year has elapsed from the date of the service of notice, ordered that this be struck off the file." And no further step was taken by the mortgagee to obtain possession of the mortgaged land, or to enforce any rights against the purchasers. But Shama Sundari, on 10th May 1879, by a conveyance in the English form, duly registered, sold and assigned to this appellant, for Rs. 11,000, all her interest in the mortgage debt and interest due from Huri Narain Dey, and in the mortgaged lands, confirming this by a subsequent deed of 1st April 1880. The prayer of the plaint was that the defendant be ordered to pay, within a time to be specified by the Court, Rs. 63,212, or the sum that might be found due on the taking of accounts and interest for the period of the suit; also a declaration was asked that in default of such payment, the defendants were not entitled to redeem, and that the plaintiff should have possession.

Huri Narain Dey and eight of the twenty-nine defendants made no defence. The others alleged title, each to their several portion of the mortgaged land, under kobalas from the mortgagor; some of them admitting notice of the mortgage, and alleging payment of the purchase-money on account of the mortgagee, Shama Sundari, others denying all knowledge of the mortgage. Some alleged title through mesne or intermediate transfers, others claimed directly through Huri Narain Dey. The latest purchase had taken place in August 1866. All those who defended relied on limitation, alleging that the mortgagor's right to possession having determined on the 17th February 1866, and twelve years from that date having expired in 1878, the suit was barred in the latter year.

On the issue of limitation, as also in other respects, the judgment of the Subordinate Judge was in favour of the plaintiff, to whom he decreed possession. He held Art. 147 to be applicable, and not Art. 135 of Act XV of 1877.

From this decree sixteen of the defendants appealed to the High Court, which reversed it as to all the defendants except the first,

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the mortgagor. The judgment of a Divisional Bench [PIGOT and O'KINEALY, JJ.] (1) was that as against all the defendants except the first, the plaintiff's suit should have been dismissed, as he had failed to prove his title as against them, and had also failed to prove the identity of the parcels occupied by them with those that he claimed. The only ground however of dismissal that need be stated is limitation, as to which the judgment of the High Court will be found reported in I. L. R., 12 Calc., 616.

On this appeal, which included all the defendants as respondents,

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the period of limitation was given by Art. 147 of Sched. ii of Act XV of 1877, and not by Art. 135, the latter having been wrongly applied by the High Court, which had failed to see the distinction between a claim to possession by the mortgagee, as against the mortgagor, made in the character of mortgagee, and a claim for an account for foreclosure and sale brought by the mortgagee, or as here by his transferee. A mortgagee, after taking proceedings under Regulation XVII of 1806, if entitled by the terms of his mortgage to possession, still had to sue for it, if out of possession, or for a declaration that he was entitled to it, if he was in possession, there being no decree upon proceedings under the Regulation—See the judgment in *Forbes* v. *Ameeroonissa Begum* (2). And it followed that such a suit brought by the mortgagee must be brought within twelve years from the date when the mortgagor's right of possession determined, that being the case to which Art. 135 was applicable. But when a suit, as in this instance, aimed at bringing the mortgage to an end, Art. 147 was applicable.

The frame and prayer of the present suit were justified by, and maintainable under, the Transfer of Property Act, 1882, which repealed Regulation XVII of 1806. They were also in accordance with s. 16, cl. c, of the Code of Civil Procedure (Act XIV of 1882). The Transfer of Property Act came into force on the 1st July 1882, establishing for mortgagees the suit for

(1) *Shurnomoyee Dasi* v. *Sreenath Dass*, I. L. R., 12 Calc., 616

(2) 10 Moore's I. A., 340.

foreclosure; so that the appellant obtained thereunder the right to maintain this suit for foreclosure. It was under this Act that his rights were enforceable against the purchasers, who were no parties to the previous proceedings against the mortgagor. There was nothing in the state of things existing between 1878 and 1882 which excluded the appellant from obtaining the benefit of the law which in the latter year he found in his favour. Referring to the development of the law of mortgage in Bengal, originally land mortgaged by way of conditional sale became the lender's property on non-payment of the money lent; but Regulation XVII of 1806 controlled the mortgagee's right until he should have taken proceedings as the Regulation directed to terminate relations according to his contract. The mortgage in the English form of land, outside the local jurisdiction of the Supreme Court and of the High Court which had succeeded it, was dealt with by the Courts in the same way. And these proceedings being ministerial, and not judicial, and the so-called foreclosure not resulting in any decree, the mortgagee had, nevertheless, in any case, to sue for possession—See the judgment in *Forbes* v. *Ameeroonissa* (1) at page 350 of the report. The provisions of the three successive Limitation Acts were then referred to, the conclusion being drawn that Art. 135 applied where the relation of mortgagor and mortgagee subsisted, and did not apply where the suit was to change the character of the relation of mortgage to that of absolute ownership.

Reference was made to *Bhowani Charn Mitre* v. *Joykishen Mitre* (2), *Forbes* v. *Ameeroonissa Begum* (1), *Brojonath Coondoo Chowdhry* v. *Khelat Chunder Ghose* (3), *Huro Chunder Gooho* v. *Gudadhur Koondoo* (4), *Sarasibala Debi* v. *Nand Lal Sen* (5), *Denonath Gangooly* v. *Nursing Prosad Dass* (6), *Ghina Ram Dobey* v. *Monaruth Ram Dobey* (7), *Burmamoye Dasi* v.

(1) 10 Moore's I. A., 340.
(2) S. D. A., 1848, p. 354.
(3) 6 W. R., 269; and, on appeal, 14 Moore's I. A., 144, and 8 B. L. R., 104.
(4) 6 W. R., 184.
(5) 5 B. L. R., 389.
(6) 14 B. L. R., 87.
(7) 7 C. L. R., 580; I. L. R., 6 Calc., 566 (note).

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Dinobundhoo Ghose (1), *Gokuldass* v. *Kripa Ram* (2), *Mankee Kooer* v. *Munnoo* (3).

None of the respondents appeared.

On a subsequent day, 5th February 1889, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The appellant, who was the plaintiff below, is the transferee of a mortgage effected by the first defendant Huri Narain Dey in favour of Shama Sundari Debi. The mortgage bears date the 17th November 1865. It is in the English form, providing for the payment of the debt on the 17th of February 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default. The property mortgaged is in the district of the 24-Pergunnahs.

On the 15th February 1872, Shama Sundari applied to the District Judge of the 24-Pergunnahs to issue as usual a notice of foreclosure to the opposite party, under Regulation XVII of 1806. The opposite party was Huri Narain. The notice was served on him, and, on the 31st March 1873, a year having elapsed from the date of the service, the case was struck off the file. It is clear, therefore, that Huri Narain's right to redeem was foreclosed, and that as against him Shama Sundari became absolute owner, on or shortly before the 31st March 1873.

In the year 1879 the plaintiff acquired Shama Sundari's interest in the mortgaged property, and on the 6th September 1882, he brought a suit against Huri Narain and twenty-eight other defendants whom he alleged to have been holding possession of several plots of the property, claiming by purchase and otherwise from Huri Narain. He stated that they ought to have been made parties to the foreclosure case, but Shama Sundari had not done that; that the defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt; and that the defendants refused to pay. He prayed an order for payment, and, in default, a declaration that

(1) I. L. R., 6 Calc., 564; 7 C. L. R., 583.
(2) 13 B. L. R., 205.
(3) 14 B. L. R., 315.

the defendants would be unable to redeem the mortgaged properties, and an order for possession.

Huri Narain has not made any defence at any stage of the suit. Of the other defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity, and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of Huri Narain at various dates, ranging from November 1865 to August 1866. Some of them stated as to their own plots, that Shama Sundari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August 1866, the difference between the cases of these defendants need not be considered. One defendant, No. 29, stated that he had purchased two plots of Huri Narain's land, one in February 1873 at a revenue sale, the other in December 1876 at an execution sale. This defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29, for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the plaintiff really acquired Shama Sundari's interest; whether the defendants' plots are or are not included in the mortgage; whether Shama Sundari was privy to the sale by Huri Narain; whether the purchase-money was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse; all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV of 1877, and the question is whether the case falls within Art. 135 or 147. Article 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged, shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines.

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Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after 60 years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation, his grounds were as follows: that if the foreclosure proceedings were regular, a new starting-point of time was gained in February or March 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were, under the Codes of 1859 and 1877, allowed in the Bengal Mofussil; and that the plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within Art. 147, which allows 60 years to sue.

From this decree, sixteen of the defendants appealed to the High Court. The Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February 1878; that, with the right to possession, was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of Art. 135, and they dismissed it against all the defendants except Huri Narain. They do not assign their reason for not dismissing it against Huri Narain, but their Lordships presume the reason to be that as against him they took the suit to be one for possession, founded on the title acquired in February or March 1873 under the Regulation. From that decree the plaintiff appeals.

All the defendants, except Huri Narain and another, are made parties respondent to the appeal. No one has appeared, and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appear to

their Lordships to be as follows: the foreclosure was, as against Huri Narain, perfect on or before the 31st March 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866; therefore, if Art. 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August 1878 at the latest.

In order to succeed then the plaintiff must show that Art. 135 is wholly inapplicable to his case. To do that, it is contended that Art. 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Art. 147; that on the 1st July 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for s. 2, cl. (*c*), of the Transfer Act says that nothing therein shall affect "any right or liability arising out of legal "relation constituted before this Act comes into force, or any relief "in respect of such right or liability." Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari.

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It is therefore unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to Art. 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Trevelyan.

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June 15.

MACKENZIE LYALL & CO. *v.* CHAMROO SINGH & CO.

Sale by auction—Auctioneers—Agent bidding "kutcha-pucca"—Usage of trade—Custom—Condition of sale.

An agent of the defendants made, at an auction sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure.

Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent.

In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated "that such an arrangement had never been repudiated:" *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore that no suit would lie.

ON the 5th November 1888, Messrs. Mackenzie, Lyall and Co., auctioneers, put up for sale, under their usual conditions of sale, certain cases of zanella cloth.

* Small Cause Court Reference No. 3 of 1889, made by G. C. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 9th of April 1889.

For lots 287 and 288, two cases of zanella cloth, one Kartick Singh, an agent of the defendants, made a bid of seven annas per yard; for lots 289 and 290 of the same cloth, he made a bid of six annas per yard.

At the time of making the above bids, Kartick Singh was informed by the auctioneers, who did not actually knock down the goods to him, that his bids were accepted "*kutcha-pucca*" and that he would be informed later on, if his offer was accepted, and to this he replied: "All right, when it is made *pucca*, inform us." At the trial a "*kutcha-pucca*" bid was explained as being equivalent to a "firm offer," and it was stated that, by the custom of trade, a man who makes a "firm offer" is bound not to withdraw it at least till a reasonable time, say two or three days, has elapsed for its acceptance, the auctioneers meanwhile undertaking to submit the offer to their principals. The only evidence, however, given on this point was that given by an assistant in the plaintiffs' firm who stated that such an arrangement had never been repudiated.

On 6th November, Messrs. Mackenzie, Lyall & Co. received a letter from the defendants, the principals of Kartick Singh, repudiating the contracts on the ground that Kartick Singh had no authority to bid for the goods on their behalf. On the 7th November, the plaintiffs having heard from their principals, wrote to the defendants, informing them that their offer had been accepted. The defendants however refused to take delivery of any of the goods, although requested so to do. The goods were therefore put up again for sale on the defendants' account, the price fetched at such re-sale showing a loss of Rs. 1,003,-8-6, and after a request for payment of this amount, Messrs. Mackenzie, Lyall and Co. sued Chumroo Singh and Co. in the Court of Small Causes for the balance due. The conditions of sale made no reference to "*kutcha-pucca*" bids, nor contained any clause stipulating for the procedure relied on.

The learned Chief Judge found that the custom relied on by the defendants, if it existed, was unreasonable; and on the question of the repudiation of the contracts by the defendants, he found that Kartick Singh was the defendants' agent, having authority to bid at the sales; that the repudiation or withdrawal by the defendants of the bid made by them, being prior in point of

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time to the acceptance of such bid by the plaintiffs, the defendants were not liable. He therefore dismissed the suit, but at the request of the pleader for the plaintiffs made his judgment contingent on the opinion of the High Court as to whether or not the defendants were liable, notwithstanding their repudiation of the bid before acceptance of the bid by the plaintiffs was communicated to them.

On the hearing of the reference,

Mr. *Acworth* for the plaintiffs referred to Pollock on Contracts (4th Edition), p. 24.

Mr. *Bonnerjee* and Mr. *Garth* for the defendants were not called upon.

The opinion of the Court (PETHERAM, C.J., and TREVELYAN, J.) was delivered by

PETHERAM, C.J.—The question in this case is, whether there was any contract between the parties.

The plaintiffs in this case are auctioneers carrying on business in this city, and the defendants are merchants, and on some day the plaintiffs published an advertisement of the goods they had to sell, and they also published the conditions of sale. On the occasion of this sale, an agent of the defendants attended the sale and bid for certain lots, and the auctioneer who held the sale did not knock down the lots, but intimated to the bidder that his bid was accepted *kutcha-pucca*.

Now, the first thing that occurs to one to do is to look at the conditions of sale to ascertain whether there are any conditions which deal with an intimation of this kind, and we find that there are not. The plaintiffs say that, by the custom of the sale room, an intimation of this kind is an intimation that the goods were put up by them for sale, subject to a reference to the owners of the goods if, I suppose, the bids are below a certain amount. What they undertake to do is, they undertake to submit the bid to the owners within a certain time, but until it has been so submitted there can be no acceptance of the bid. In this case, the defendants withdrew the bids, or repudiated the bids, or at all events they wrote to the auctioneers intimating that they did not intend to purchase the goods. In an

ordinary sense, it is clear that a bid made at auction can be retracted before it has been accepted, the reason being that until the goods are knocked down there is no contract with any one. He who makes the offer may withdraw unless he is under a contract not to do it, because until it is accepted there is no contract between the parties. The defendants having withdrawn the bids before they were accepted, it is clear there was no contract of sale. Mr. Acworth admits that what took place could not amount to a contract of sale, but he contends that there is, by the custom of these sale rooms, an implied agreement, or an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promises not to retract his bid until it has been either accepted or refused. It may be that that very often takes place. There is no evidence to show that there was such a contract in this case. Indeed the evidence is the other way, because if it were part of each contract, you would expect to find it mentioned in the conditions of sale, but the auctioneers do not place anything of the kind in the conditions of sale. Then, is there any evidence that there was so universal a custom as to become part of the contract by operation of law? There is no evidence of that kind. The only evidence given on the subject is the evidence of one of the assistants in the sale room, that such an arrangement had never been repudiated. That in my opinion is absolutely insufficient to establish a custom of this kind, and I think, therefore, that, under these circumstances, there was no contract, and there being no contract there could be no breach and no cause of action, and the learned judge of the Small Cause Court was right in dismissing the suit so far as the goods were concerned.

I think it right to add that if any persons in the position of auctioneers wish to incorporate any such special arrangements as this in their contracts, it ought at least to be made a portion of the conditions on which they sell.

In the result, the questions referred to us will be answered in the negative.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice anerjee.

1889 *June* 18.

SURYA KANT ACHARYA BAHADUR (DEFENDANT) *v.* HEMANT KUMARI DEVI (PLAINTIFF). *

Land Registration Act (Bengal Act VII of 1876), *s.* 78—*Suit for rent by unregistered proprietor—Application for registration as proprietor.*

Section 78 of the Land Registration Act 1876 precludes a person claiming as proprietor from suing a tenant for rent until his name has been actually registered as such under the Act. A mere application to be registered is not sufficient for the purpose.

THIS was an appeal against a decree for arrears of rent obtained by the respondent Rani Hemant Kumari Devi, as Zemindar, against the appellant Raja Surya Kant Acharya, as the holder of a tenure in her zemindari.

On the 23rd Bhadro 1294 (13th September 1887) Rani Hemant Kumari brought a suit to recover from Raja Surya Kant Acharya the arrears of rent, and road and other cesses, for the years 1292 and 1293 (1885 and 1886). The plaintiff was the widow of the late Raja Jotindro Narain Roy, and as such claimed the whole of his estate, and to have come into possession upon the death of Rani Sarat Sundari Devi, the mother of the late Raja and the executrix of his will. On the 16th Pous 1294 (30th December 1887), subsequently to the institution of her suit, the plaintiff applied for the registration of her name as proprietor of the estate of her late husband under the Land Registration Act (Bengal Act VII of 1876).

Several objections, more or less technical, were taken to the suit by the defendant, all of which the Subordinate Judge overruled, giving the plaintiff a decree for a portion of her claim. The only objection material to this report was whether the plaintiff could recover rent from the defendant inasmuch as her name had not been registered under the Land Registration Act,

* Appeal from Original Decree No. 62 of 1888, against the decree of Baboo Kali Churn Ghosal, Officiating Subordinate Judge of Mymensingh, dated the 9th of January 1888.

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1876. Regarding this objection the Subordinate Judge observed: 'There is no doubt whatever as to the plaintiff's right to receive rent from the defendant, for the latter has already deposited rent to her credit. Then plaintiff has very recently succeeded to her zemindari, and she has, as will be seen from the copy of the petition (Exhibit III), filed on her behalf, already applied under the Land Registration Act for the registration of her name. I see no valid objection why she should not be allowed to sue for the rents claimed. It is true that her name has not been registered as yet, but it may take a good deal of time to have that effected, and is the plaintiff on that account to allow her claim for rent to be barred. I think not, when the plaintiff's title is not denied. I suppose her application for the registration of her name is quite sufficient to satisfy the requirements of law." Accordingly the Subordinate Judge decided this objection against the defendant. The defendant appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboos *Sreenath Das* and *Kishori Lal Sircar* for the respondent.

The judgment of the High Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

This is an appeal against a decree for arrears of rent obtained by the respondent as zemindar against the appellant as holder of a tenure in her zemindari.

The plaintiff, respondent, claimed the whole of the estate as widow of the late Raja Jotindro Narain Roy, and to have come into possession upon the death of Rani Sarat Sundari Devi, who was the executrix under the will of the late Raja. It is not quite clear upon the pleadings on what date the plaintiff succeeded to possession, but it must have been either at the extreme end of the year 1292 or sometime in 1293.

The Court below over-ruling several objections, more or less technical, taken by the defendant, gave the plaintiff a decree.

The same objections have been urged in the appeal before us; and we are forced to the conclusion, we must say somewhat unwillingly, that as to one of these objections, technical as it is, the appellant is entitled to succeed. That objection is that when this suit was brought and when the decree was passed, the

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plaintiff was not registered under the Bengal Council Act VII of 1876. The lower Court got over this objection by saying that it appeared that, before the suit was decided, the plaintiff had made an application to have her name registered, and that that might, in the Subordinate Judge's opinion, be taken as quite sufficient to satisfy the requirements of the law. The law says in s. 78:—"No person shall be bound to pay rent to any person claiming such rent as proprietor or manager, &c., unless the name of such claimant shall have been registered under this Act." It seems to us quite clear that the lower Court is wrong in supposing that an application to be registered is the same in effect as having been registered; for, if an application to be registered is the same in effect as having been registered, then in respect of every estate, there might be half-a-dozen claimants suing at the same time; and one of the objects of the law is that tenants should not be harassed by suits for rent by landlords who have no title thereto. The words of the law appear to us clearly to require before a person sues for rent, claiming as proprietor, that such person must be registered under the Act; for if a tenant is not bound to pay rent to an unregistered proprietor, he is not liable, we think, to be sued for it.

This observation has been made before in a similar case before this Court. The decision, which has been cited, is *Dhoronidhur Sen* v. *Wajidunnissa Khatoon* (1), decided on the 10th January 1888. If the law tells a tenant that he is not bound to pay any

(1) *Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Tottenham.*

DHORONIDHUR SEN AND OTHERS (DEFENDANTS) *v.* WAJIDUNNISSA KHATOON (PLAINTIFF).*

Land Registration Act (Bengal Act VII of 1876), s. 78—Suit for rent by unregistered proprietor.

It is a condition precedent under s. 78 of the Land Registration Act, 1876, that a person must be registered as proprietor or manager before he can bring a suit for arrears of rent.

SUIT for arrears of rent.

The fact of this case are sufficiently set out in the judgment of Tottenham, J.

* Appeal from Original Decree No. 268 of 1886, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Jessore, dated the 25th June 1886.

person who is unregistered, it follows that it was not intended that an unregistered person should be able to sue him, not only to recover the amount of rent, but also the costs and possibly damages for non-payment.

The *Advocate-General* (*Sir Charles Paul*) and Baboo *Golap Chunder Sarkar* for the appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Jogesh Chunder Roy* for the respondent.

The following judgments were delivered by the High Court (PETHERAM, C.J., and TOTTENHAM, J.) :—

TOTTENHAM, J.—This was a suit brought to recover the rent of a patni. It was brought against nine persons, upon the ground that they being a joint family were all joint owners of the patni.

The patni is registered in the plaintiff's books in the name of the defendant No. 1 only, Dhoronidhur Sen, who had purchased it at an auction sale under Regulation VIII of 1819 in the year 1873. The plaintiff alleges herself to be the matwalli of the estate to which this patni belongs. The estate is said to have been created a waqf by one Hafizunnissa, and Hafizunnissa is said to have constituted herself the first matwalli, and afterwards, in the month of Cheit 1291 to have appointed the present plaintiff, Wajidunnissa, matwalli in her stead. Wajidunnissa therefore brought this suit to recover the patni rent for the years from 1289 to 1292.

The objections taken in the defences were, first, that the plaintiff, not being registered as a manager or proprietor under Bengal Act VII of 1876, was not competent to sue for the rent at all. It was also contended that only one of the defendants, Dhoronidhur, was liable to pay the rent, he being the sole patnidar, the other defendants having no concern with it, that is to say, not being liable for the rent by any agreement between themselves and the plaintiff. Another plea was added on the part of Dhoronidhur that, as regards a great portion of the claim, payment had been made.

The lower Courts decided all the points in favour of the plaintiff, except as to the sum of Rs. 100, for which the Court gave credit to the defendants in diminution of the amount of the claim. The defendants have appealed, and the same objections have been repeated in this Court.

It appears to us that the first objection is fatal to the suit, the objection, namely, that the plaintiff, not having been registered under Bengal Act VII of 1876 at the time the suit was filed, was not competent to institute it. It is true that, during the pendency of the suit and before the decree was made, she had got herself registered, but s. 78 of the Act provides that "no person shall be bound to pay rent to any person claiming rent as proprietor or manager of an estate or revenue-free property, in respect of which he is required by this Act to cause his name to be registered, or his mortgagee, unless the

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In the present case, there appears to be really no question that the plaintiff was entitled, as widow of her late husband, to receive the rent payable by the defendant; and probably if the rent claimed had not been at an enhanced rate, the present objection would not have been taken. As it has been taken, we think we are bound by law to give effect to it.

name of such claimant shall have been registered under this Act." It seems to follow from the fact that no person is bound to pay rent to such person that such person is not competent to sue him until registered.

For the respondent, it has been contended by Baboo Mohesh Chunder Chowdhry that this objection, if valid at all, could only apply to the rent accruing due subsequent to the death of the previous matwalli. He contends that, as regards the rents previously due, they were assigned to the present plaintiff under the deed by which she was created matwalli.

This contention appears to us to be fallacious, inasmuch as the rents which accrued due in the lifetime of Hafizunnissa were, upon the plaintiff's own showing, not due to *her*, but to the waqf estate; and the present plaintiff's position is not that of an assignee from Hafizunnissa, but of a manager recovering the debts due to the estate. The section of Bengal Act VII of 1876 appears to me to apply equally to both kinds of arrears, those due before and those accruing due after the incumbency of Hafizunnissa. We think therefore that this suit should have been dismissed on this ground.

In this view, it is not necessary that we should determine the other objection, whether the plaintiff is entitled to sue all the defendants or not, the question being whether they are all proprietors of the patni or only Dhoronidhur. But we may observe that, in the state of the evidence on the present record, we should not be prepared to hold that the plaintiff is entitled to recover a decree from them all. We think that the evidence adduced by the plaintiff does not show that they are all holders of the patni. The presumption of law that because the family was generally joint, the purchase-money for the patni must have come from joint funds, is not we think by itself sufficient to over-ride the facts disclosed by the documents of title under which Dhoronidhur is the registered patnidar, and in the Court below, the issue whether or not the patni was acquired by joint funds was not distinctly raised between the parties.

However that may be, we think that, for the reasons given above, the present suit must be dismissed. The plaintiff being now the registered manager or owner will be at liberty, if he thinks fit, to bring a fresh suit in which all these questions could be fully decided between the parties.

As the lower Court ought not to have tried this suit at all, none of its findings can have binding effect.

PETHERAM, C.J.—With reference to the liability of all the defendants jointly in this case, all that we say is that, as the record at present stands, we do not

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The result is that that portion of the plaintiff's suit, in respect of which this appeal has been preferred, must be dismissed.

The appellant will be entitled to his costs in this Court on the sum at which this appeal is valued, and in the lower Court on the whole amount claimed by the plaintiff.

C. D. P. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

G. CHISHOLM (DEFENDANT) *v.* GOPAL CHUNDER SURMA (PLAINTIFF).*

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June 14.

Set-off—Cross-demand arising out of the same transaction—Civil Procedure Code (Act XIV of 1882), s. 111.

When the defence raises a cross-demand which is found to arise out of the same transaction as, and is connected in its nature with, the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under s. 111 of the Civil Procedure Code.

Bhagbat Panda v. *Bamdeb Panda* (1) relied on ; *Clark* v. *Ruthnavaloo Chetti* (2) referred to.

SUIT for the recovery of arrears of salary.

The defendant, who was the Agent of The Rivers Steam Navigation Company at Behali, on the 28th November 1882,

think there is sufficient evidence to charge them all jointly. Whether it would be or is possible, or whether it is the fact and could be proved by any other evidence, that the whole of this joint family are in possession of the patni is a different matter, but as the record at present stands, we do not think there is sufficient evidence to support the finding of the learned Judge, but we decree this appeal on the ground that the plaintiff cannot sustain this suit by reason of her not having been the registered proprietor at the time when the suit was brought, and by reason of the provisions of s. 78 of Bengal Act VII of 1876. We express no opinion whatever as to any finding of the learned Judge with reference to the joint liability of the defendants except we think that the evidence at present on the record is not sufficient to sustain it. The appeal will be decreed with costs.

C. D. P. *Appeal decreed.*

*Appeal from Appellate Decree No. 1474 of 1888, against the decree of H. Luttman-Johnson, Esq., Judge of the Assam Valley Districts, dated the 8th of May 1888, affirming the decree of Baboo Madhub Chunder Bardolai, Munsiff of Tejpur, dated the 31st January 1887.

(1) I. L. R., 11 Calc., 557. (2) 2 Mad. H. C., 296.

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appointed the plaintiff his mohurir at the Steamer Ghât on a salary of Rs. 40 per mensem. The plaintiff was at first allowed the services of three chowkidars on Rs. 6 per mensem each, but in March 1883 this number was reduced to two by the defendant. In July 1884 the plaintiff tendered his resignation, and on the 1st September following was relieved of his duties. After repeated demands for payment, the plaintiff brought this suit to recover the sum of Rs. 890 which he claimed on account of arrears of his salary and the wages of the chowkidars up to the end of August 1884, after giving credit to the defendant for various sums of money amounting to Rs. 204 paid from time to time.

The defendant contended that on account of goods and property damaged, lost, or not accounted for by the plaintiff, he was entitled to set-off the sum of Rs. 624-6-3 made up of the following items:—

		Rs.	As.	P.
(1)	Tea-lead, damaged through plaintiff's negligence, value	188	0	0
(2)	A boat lost while in charge of the plaintiff, value	50	0	0
(3)	Timber in plaintiff's charge not accounted for, value	138	0	0
(4)	Kayah's stores received from steamer and not delivered or accounted for, value	84	12	0
(5)	Advance paid when plaintiff was serving as Garden Mohurir ...	25	15	0
(6)	Freight on goods landed from steamer realized, but not paid to defendant	7	11	3
(7)	Amount received from the Steam Navigation Company on account of salary	130	0	0
	Total Rs. ...	624	6	3

As regards the last item the defendant alleged that the plaintiff had received this sum of money from the Rivers Steam Navigation Company on account of his salary in addition to the sum of Rs. 204 which the plaintiff admitted had been paid to him on the same account by the defendant.

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Both the Extra Assistant Commissioner of Tejpur and the Judge of Assam on appeal decreed the plaintiff's claim in full, holding that inasmuch as the items claimed as set-off were not ascertained sums of money within the meaning of s. 111 of the Civil Procedure Code, they could not be set off against the plaintiff's claim. The defendant appealed to the High Court.

Baboo *Pran Nath Pundit* for the appellant.

Baboo *Jogendro Nath Ghose* for the respondent.

The judgment of the High Court (TOTTENHAM and BANERJEE, JJ.) was as follows:—

This appeal has been preferred by the defendant in a suit brought against him by the plaintiff to recover arrears of salary. The defendant disputed the amount due. In his written statement he has set out a number of items for which he claimed credit; and the total of which, if allowed, would reduce the plaintiff's claim by Rs. 624 odd.

Both the Courts below decreed the plaintiff's claim in full, holding that none of the items set out by the defendant in his defence came within the scope of s. 111 of the Code of Civil Procedure and could not be claimed as a set-off. Against this decision the present appeal has been brought. As regards most of the items set out by the defendant we concur with the lower Court in thinking that they do not come within the scope of s. 111, for most of them are not ascertained amounts due by the plaintiff. It is true that they are all specified amounts, but specified amounts are not necessarily ascertained debts. As regards, however, one of the items, it was not pleaded as a set-off, but it was alleged to be payment on account of salary for which the suit is brought. The plaintiff has given credit for Rs. 204, as having been paid from time to time. The defendant pleaded a further payment of Rs. 130. That payment he did not allege to have been made personally to the plaintiff, but he alleged that the plaintiff had received it from the Steamer Company whose servant the defendant was, and which was in a sense, therefore, employer of the plaintiff also, although it may be that the defendant had employed the plaintiff without any reference to the Steamer Company. Be that as it may, if the plaintiff actually received Rs. 130

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from the Steamer Company on account of monthly salary, that amount will have to be credited in the present suit. At all events the Court should have enquired into this item, and not treated it as a claim to set-off, under s. 111 of the Code. Then as regards the other items set out in the first Court's judgment as claimed by the defendant, although most of them may not, and do not, come within the scope of s. 111, still we think, independently of that section, that the defendant was entitled to bring them forward, and have an adjudication in respect of them in this suit. They were in the nature of cross-claims, and were so connected with the plaintiff's claim for salary as servant and agent of the defendant, that it would seem inequitable to compel the defendant to have recourse to a separate suit to recover them. This has been laid down in *Clark* v. *Ruthnavaloo Chetti* (1). It was there said "that the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit" That decision was followed not only in later cases in the Madras Court, but also followed in this Court, in a case of *Bhagbat Panda* v. *Bamdeb Panda* (2); and we think that the law there laid down is applicable to the present suit. The claims as made by the defendant arise for the most part out of the relation set up by the plaintiff in this suit, as a suit of master and servant, or principal and agent; and so far as these items are claimed in respect of the alleged neglect or misconduct of the plaintiff in his capacity of servant of the defendant, we think that the defendant was entitled to have the claims enquired into. Of course there may be, as regards each item, several reasons why the defendant may fail in recovering, still those are matters which will have to be enquired into.

We therefore direct that the case be sent down to the Court of first instance to be re-tried.

Costs will abide the result.

C. D. P. *Appeal allowed and Case remanded.*

(1) 2 Mad. H. C., 296. (2) I. L. R., 11 Calc., p. 557.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

GOLAP PANDEY (PETITIONER) *v.* R. H. BODDAM (OPPOSITE PARTY).* 1889 *June* 3.

Summary Trial—Magistrate, power of, to try case summarily—Criminal Procedure Code (Act X of 1882) s. 260—Criminal Trespass—Penal Code (Act XLV of 1860), s. 447.

A complainant applied to a Magistrate for process against certain persons under ss. 447, 146, 148, and 149 of the Penal Code. The Magistrate, having perused the petition of the complainant and examined him on oath, issued summonses against the persons named under those sections. The complainant was not himself an eye-witness of the occurrence, and merely stated in his petition and evidence what he had been told by his servants. Subsequently, before the accused appeared, the Magistrate examined an eye-witness, and issued a fresh summons under s. 447 only, and then proceeded to try the case summarily and convicted one of the accused. It was contended that he had no power so to try and dispose of the case.

Held, that the Magistrate had power to try the case summarily.

When a Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily, and the mere fact that a complainant enumerates sections of the Penal Code relating to offences not triable summarily does not affect the jurisdiction of the Magistrate, unless the facts of which he really complains disclose such offences.

During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to the premises belonging to the defendant for the purpose of making a survey and for getting materials for a hostile application against the defendant. They went (some of them armed) and without the permission of the defendant, and in his absence, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting,

Held, that their actions amounted to criminal trespass.

THE facts of this case were as follows :—

Mr. R. H. Boddam, the complainant, was the lessee of a tract of land from the Raja of Palganj on the Parasnath Hill, which was a hill sacred to the Sitambari Society of the Jain community,

* Criminal Motion No. 192 of 1889, against the order passed by W. H. Thomson, Esq., Deputy Magistrate of Giridih, dated the 22nd of April 1889.

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and on and about which were situate temples belonging to that society. The complainant had originally a tea-garden on his land, but finding that it would apparently be a profitable business he set up a hog's lard manufactory on his land. This action gave offence to the society, and various proceedings were taken with a view to put a stop to the manufactory which ultimately resulted in a civil suit being filed against Mr. Boddam and his lessor, which suit was pending at the time of these proceedings. On the 23rd March 1889, Mr. Boddam laid a complaint before the Deputy Magistrate of Giridih, charging the petitioners Golap Pandey and others with offences punishable under ss. 447, 146, 148 and 149 of the Indian Penal Code, and asking that they might be bound down to keep the peace under s. 106 of the Criminal Procedure Code.

The complaint was based on a petition of Mr. Boddam in which he set out the facts leading up to the civil suit, and the annoyance he had suffered in consequence, and stated that on the 24th February, when he was away in Calcutta, a large party under the leadership of Golap Pandey, acting under the orders of the temple authorities, trespassed on to his garden, and made a survey of his lands; that two of the party were armed with swords and a number of the others with *lathies*; that they threatened his servants, and in spite of their objections, proceeded to make a survey of the land; and that their proceedings nearly resulted in a breach of the peace. Mr. Boddam's deposition was recorded by the Magistrate in support of his application, and it appeared that his knowledge of the occurrence was derived from information received from his servants, as he himself was away in Calcutta at the time.

The Magistrate, on this application, issued summonses against the persons named, under the sections named in Mr. Boddam's petition.

On the 6th April, the returnable date of the summons, none of the accused appeared owing to their inability to reach the Court on that day. The Magistrate on that day appeared to have examined one witness named Bhuttu Maji, who was an eye-witness of the occurrence complained of by Mr. Boddam, and upon his evidence issued fresh summonses to the accused under s. 447 of the Penal Code only.

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On the 13th April, the case came on before the Magistrate, who tried it summarily and convicted the accused Golap Pandey of an offence under s. 447, and sentenced him to pay a fine of Rs. 100.

The judgment of the Deputy Magistrate was as follows :—

Mr. R. H. Boddam, of Parasnath, states on oath, that he has the lease of a large tract of land from the Raja of Palganj, on an eastern spur of the Parasnath Hill, a hill which is sacred to the Sitambari Society of the Jain community. This society has temples at Madhuban, the foot of the hill, and on the top of the hill ; they have also several shrines on the several peaks. These temples and shrines are visited at various times of the year by Jain pilgrims. The leaders of the society are Rai Budrinath Das of Calcutta and Rai Dhunput Singh of Moorshedabad. Accused Golap Pandey is their agent at Madhuban, and is manager of the various temples and shrines. Mr. Boddam does not know the other two defendants. Mr. Boddam has a tea garden on the lands leased him, and in the midst of this garden he has recently established a piggery and a lard manufactory. This action on the part of Mr. Boddam seems to have given the Sitambari Society great offence, and whereas the former and the representatives of the latter used to be very friendly before, they are now, I may say, rancorous enemies. The Sitambari Society have for some time been trying to force Mr. Boddam to close up his piggery and lard manufactory. They at first worked through the Bengal Government, and then instituted a civil suit. An injunction was issued by the Deputy Commissioner of Hazaribagh, directing Mr. Boddam to stop all business at his manufactory, until the disposal of the civil suit. Mr. Boddam appealed to the High Court, and on the 12th February the injunction was set aside. Mr. Boddam at once issued orders for the resumption of operations, and he says that the Sitambari Society almost simultaneously adopted ways and means to terrorize his workmen, and induce them to desert, and thus smash up his (Mr. Boddam's) business. While Mr. Boddam was away at Calcutta, a large party, acting under the orders of the temple authorities, trespassed into Mr. Boddam's garden and made a survey ; Mr. Boddam says this took place on the 24th February, but the evidence heard by me, shows it was on Monday, the 25th February. Mr. Boddam insinuates that the survey was all sham, that the party simply came to intimidate his workmen, and they succeeded in this, some of his workmen have run away, and his munshi, Bhatta, has served a notice to quit. Mr. Boddam also states, that the leaders of the society have often told him that if he persisted in carrying on the lard manufactory, he would be jeopardizing his life. Mr. Boddam wants defendants to be punished for their trespass, and also to be bound down to keep the peace under s. 106, Criminal Procedure Code. I find that, under Mr. Boddam's lease, he is bound to give up to the Sitambari Society any portion or portions of the lands

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leased him, if it is needed by them for the purpose of erecting temples, shrines or dharmsalas; Mr. Boddam is entitled to an abatement of rent for each such relinquishment. There is a Government road from Madhuban to the top of the hill. This road runs through Mr. Boddam's garden. Mr Boddam's bungalow is a good way off the road, and a private road leads to it from the Government road. This private road continues on to the lard manufactory, which is further interior. *Bonâ fide* visitors are allowed access to the garden, but Mr. Boddam says that the public have no right to make use of his private roads and paths for any and every purpose they may choose. Recently Mr. Boddam has made a cart track, which passes by his lard manufactory; this track acts as a short cut for his workmen who come up from the foot of the hill; it is also admitted by Mr. Boddam's witnesses that jungle people take their carts along the track.

Bhattu Manji, aged 35, son of Gopal, is Mr. Boddam's munshi, and is in charge of the lard manufactory; in general matters he is second in authority to Kishen Manji, aged 25, son of Bilsi. The latter remains in charge of the garden during Mr. Boddam's absence. Hulas Singh, aged 30, son of Bhavani, is Mr. Boddam's bungalow peon. These three men have been examined as witnesses by the prosecution. Bhattu's deposition shows that, on a Monday, Golap Pandey Lukshmi Chand and a Bengali Amin all of a sudden turned up in doolies at the lard manufactory. Each dooly had four bearers; defendants Gonder and Amrit accompanied the party and also a flag bearer. The party came up by the jungle cart track, referred to above, and not by the Government road. Witness insinuates that this route was adopted, because the party wished to avoid being observed by Mr. Boddam's workmen and labourers, whom they would have met, had they come up by the regular road. Gonder and Amrit had each a sword, and there was also a sword in Lukshmi Chand's dooly. The party began a survey; witness remonstrated with them for attempting such a thing in his master's absence, and without his previous permission; he was scolded into silence, and was told that the party were acting under the orders of the Bengal Government. He withdrew further opposition, and the party after taking bearings to a peak on the top of the hill, and making a survey of the piggery and the lard manufactory, proceeded towards the bungalow, measuring the road as they went. Witness did not follow them. Witness gives some hearsay evidence regarding the threats to the workmen, referred to by Mr. Boddam, and says that two workmen, Birbal and Roopun, have run away, and he himself intends leaving. Witness says that before the survey began, an offering of a pice was made to a stone near the piggery, he does not remember having seen any offering made to the stone previous to this, nor has he heard it styled "Bhoirubsthan." On reaching Mr. Boddam's bungalow, the party were confronted by Hulas Singh, and a scene similar to what occurred between them and Bhattu again took place. Witness snatched the flag and refused to give it up. Matters stood thus, when Kishen Munshi

appeared on the scene, he bid the peon stand aside, and entered into a conversation with the party himself. This witness, Hulas, says that the stone to which offerings are made, is not on Mr. Boddam's land. Kishen Manji says the party boasted of having received orders from the Bengal Government to make the survey; witness asked for the order; it was not produced, but he was told that Rais Dhunput Sigh and Budri Dass were great friends of Government, and had ordered the survey. While this conversation was going on, the party finished their work and left. Witness at first said that, when he appeared on the scene, Hulas was having a peaceful conversation with the trespassers, but he corrected himself immediately after, and said that angry words were passing between them.

Such is the case for the prosecution, a very much tamer affair than I had supposed it to be. Golap Pandey says that private business took him to the vicinity of the piggery; an amin was going up to survey the piggery and the "Bhoirubsthan" in it, and he accompanied him to show him the latter place. The other two defendants simply acted as attendants. Golap Pandey seems to think his action quite legal; he says he has always had free access to Mr. Boddam's house lands and premises, and that he was not legally bound to take previous permission for the purpose of an entry to make a survey. The presence of the sword is ascribed to the practice of jungle travellers always having such weapons with them for the purpose of defence against wild beasts. Prosecution witness, Bhuttu, distinctly says that the object of the trespassers was to make a survey. The evidence of Ishri Pershad, aged 28, son of Tejnarain, shows that the Deputy Commissioner's injunction was set aside, because in the plaint which accompanies the application made by the Jains for the injunction the boundaries of the tract in lease to Mr. Boddam were not given, nor were the interior details of his garden and piggery fully and properly described. The High Court transferred the civil suit to the Subordinate Judge of the 24-Pergunnahs, and the legal advisers of the Jains advised the making of another attempt for an injunction after obtaining all the necessary materials. They directed Lukshmi Chand to have the tea garden surveyed and to prepare a map, showing its boundaries and the position of the piggery, lard manufactory, and Mr. Boddam's bungalow in it. Witness cannot say whether the leaders of the community were consulted in this matter, or whether their permission was obtained to the making of a survey; so far as witness' knowledge goes, Lukshmi Chand was given full powers to exercise his discretion in this matter by the legal advisers, and he appointed an amin, whose name witness does not know, and had the survey made. Witness files the map prepared by the amin which is marked Exhibit I. On all the facts before the Court, there is hardly a doubt that the real object of the trespass was to make a map of Mr. Boddam's lands and premises for the purpose of the civil suit, but they ought to have known that doing this in the illegal way they did would cause Mr. Boddam annoyance.

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Poran Chand, aged 28, is one of the managers at Madhuban. He swears to the existence of the most friendly relations between his community and Mr. Boddam, prior to these complications; when the lard business was first started, witness, under orders from his principals, visited the place without obtaining previous permission, and was shown over the works by the *chota sahib*, and afterwards by Mr. Boddam himself. Witness says that Mr. Boddam's garden paths are used as a short cut by him and pilgrims; that he has never been stopped while passing through the garden. He says there is a "Bhoirubsthan" near the piggery, which pilgrims visit while descending from the shrines on the top of the hill; witness says he has seen offerings being made to this idol, which, he says, is in Mr. Boddam's compound. To a question put by the Court, witness said that pilgrims have a right to visit the "Bhoirubsthan," but Mr. Boddam may send them away, if he finds them straying about in other portions of his lands without his permission. Witness was asked whether the Jain community had a right to enter on Mr. Boddam's lands, and do any act they pleased; after a deal of hesitation he gave a reply in the affirmative, and said they could build temples and shrines on any portion of Mr. Boddam's lands, without taking his previous permission. Witness says he was away at Moorshedabad when the amin visited the place, and he cannot say under whose orders the survey took place.

Admitting all that defendants urge, which are: (1) that the Jain community have a right to make Mr. Boddam deliver to them lands they may need for sacred purposes; (2) that they use the garden paths as a short cut; (3) that they have a right to visit a "Bhoirubsthan" near the piggery; (4) that they are admitted into Mr Boddam's lands as sight-seers; (5) that previous to these complications the temple people were allowed to go in and out of Mr. Boddam's lands without any let or hindrance, nevertheless, it is very clear that they have not the right to go on Mr. Boddam's lands, and do any or every act they please. Defence witness, Poorno Chunder, distinctly says that Mr. Boddam would be perfectly justified in sending out of his premises any member of the community he may find straying about portions of his lands other than that occupied by the "Bhoirubsthan."

Defendants' vakil urges that all the facts set forth by the prosecution do not constitute criminal trespass, for proof of motive to annoy on the part of his clients is absent. He urges that a survey for the purpose of a civil suit pending was absolutely necessary, and an entry for the purpose of such a survey does not amount to criminal trespass. A distinct provision is made in the Civil Procedure Code for such a case; if the vakil's interpretation of the law were correct, the Code would have said that the person wishing to make the survey was at liberty to enter his adversary's lands and make the survey, without being liable to be treated as a trespasser; on the contrary, the Code lays down that the survey in such a case is to be done through the Court. Defendants admit having acted all along under legal advice,

and they ought to have known what the correct procedure is; they departed from the correct procedure wilfully, and it is absurd for them to argue, that they had no idea that their conduct would cause Mr. Boddam annoyance. Their action did cause annoyance; they must have known very well that they would cause annoyance, and the Court holds that all the elements necessary to make a trespass—criminal trespass—existed. The Court is distinctly of opinion that defendant Golap Pandey ought to have taken Mr. Boddam's permission before he made the survey, and that his having done so without permission, amounts to an entry for the purpose of causing annoyance. The Court finds Golap Pandey guilty of criminal trespass to cause annoyance, and, under s. 447 of the Penal Code, sentences him to a fine of Rs. 100. As regards the other two defendants, the evidence shows they followed Golap Pandey simply as attendants, and on the facts before the Court, it would not be fair to hold that they were participators in the offence committed by Golap Pandey, the Court therefore acquits them under s. 245, Criminal Procedure Code.

The Court does not consider action under s. 106 Criminal Procedure Code needed.

Golap Pandey thereupon applied to the High Court under its revisional power for a rule, calling on the Deputy Magistrate and the opposite party to show cause why the conviction and sentence should not be set aside, upon, amongst others, the following grounds:—

(1). That the Deputy Magistrate had no jurisdiction to try the case under s. 260 Criminal Procedure Code, and the said trial was illegal and improper, and as such ought to be set aside.

(2). That the proceedings and the judgment of the Deputy Magistrate did not comply with the provisions of s. 264 Criminal Procedure Code, and therefore the conviction and sentence based thereon ought to be set aside.

(3). That the lands in dispute being the subject-matter of the civil suit in which the complainant had been sued as a trespasser on the said lands, the petitioner, the servant of the plaintiffs therein, was not guilty of an offence under s. 447 Penal Code, for a *bonâ fide* entry therein for the purpose of a survey, under legal advice, for the purpose of the said suit without any intention of either committing any offence or intimidating or insulting or annoying the complainant.

(4). That there being no evidence or finding that the complainant was the owner of the lands (and, as a matter of fact, a

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bonâ fide civil suit being pending in the Civil Court with respect to the title thereto) the conviction under s. 447 was illegal.

(5). That, admittedly the Jain Sitambari Society having a right to go over the Hills for the purpose of worshipping or selecting a site for any new temple thereon, the entry, as alleged and found against your petitioner, did not constitute any offence under s. 447 Penal Code.

(6). That as there was no evidence that the petitioner entered the land with the intention of committing any offence or intimidating or insulting or annoying the complainant or his men, the learned Deputy Magistrate was wrong in convicting the petitioner under s. 447 Penal Code.

(7). That the findings of the Deputy Magistrate do not support a conviction under s. 447 Penal Code.

Upon this application, a rule was issued, which now came on to be heard.

Mr. *Woodroffe* and Baboo *Dwarka Nath Chuckerbutty* for the petitioner.

Mr. *Hill* and Baboo *Dwarka Nath Mookerjee* for the opposite party.

The arguments advanced at the hearing of the rule are sufficiently stated in the judgment of the High Court (TREVELYAN and BEVERLEY, JJ.), which was as follows:—

The first question which we must decide in this case is whether we ought to hold that the Magistrate had no power to try this case summarily, and that his proceedings are illegal.

Learned counsel for the accused cited to us cases to show that the offence was, for the purposes of s. 260 of the Criminal Procedure Code, determined by the complaint, and that if a complaint be made of an offence not triable summarily, the Magistrate cannot under any circumstances investigate the complaint summarily.

Although there are expressions used in some of the cases sufficient to justify this argument, we do not think that the cases are so unanimous as to force us to the same conclusion.

We say this as it appears to us that there may frequently be cases in which the charge has been exaggerated, and is, on exami-

nation by the Magistrate before process is issued, reduced to its proper proportions. This is notoriously the case in respect of many charges, which, according to the complaint, would be triable exclusively by a Court of Session, but which when shorn of their exaggeration the Magistrate very properly finds to be comparatively slight offences within his own cognizance.

If the complainant does not complain of this course, it is difficult to see why the Magistrate should adopt the procedure applicable only to the exaggerated charge.

In the case of *The Empress* v. *Abdool Karim* (1), Mr. Justice Ainslie, with the concurrence of Mr. Justice Broughton, says: "If a charge of an offence not triable summarily is laid and sworn to, the Magistrate must proceed with the case accordingly, unless he is at the outset in a position to show from the deposition of the complainant that the circumstances of aggravation are really mere exaggerations and not to be believed." In another case, *The Queen* v. *Aboo Sheikh* (2), where a man was charged with rioting, and the Magistrate tried the case summarily as one of mischief and unlawful assembly, Phear and Ainslie JJ, declined to interfere at the instance of the accused person.

In the matter of Mewa (3), it was held that a Magistrate has a discretion to enquire into and try a person on any charge which he may consider covered by the facts reported without reference to the particular charge which may have been pressed, and without reference to the procedure, which, when he has determined the offence with which he will charge the accused, it will be competent for him to adopt. In the two latter of these cases the Judges do not seem to have heard any argument, but the same observation can be made with regard to the cases of *The Queen* v. *Johrie Singh* (4) and *Ram Chunder Chatterjee* v. *Kanye Laha* (5) cited to us by Mr. Woodroffe for the petitioner.

In the present case the complaint was made by Mr. Boddam, who did not pretend to be an eye-witness of what had occurred. The Magistrate, before issuing process against the accused, exa-

(1) I. L. R., 4 Calc., 18 cf. p. 20.
(2) 23 W. R., Cr., 19.
(3) 6 N.W., 254.
(4) 22 W. R., Cr., 28.
(5) 25 W. R., Cr., 19.

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mined an eye-witness, one of Mr. Boddam's servants, and his statement showed what the real complaint was. We think that this case comes within the class of cases contemplated by Mr. Justice Ainslie, and that when the Magistrate ascertains that the facts which are alleged to have taken place disclose only an offence triable summarily, he can dispose of such case summarily. The mere fact that the complainant enumerates sections of the Penal Code relating to offences not triable summarily, does not, we think, affect the jurisdiction of the Magistrate unless the facts of which he really complains disclose such offences.

We think that this case was triable summarily. It has also been urged before us, that no offence has been committed, the object of the intruders only being to survey the premises.

No doubt that was their primary object, but when we find them going on to the premises in Mr. Boddam's absence and without his leave, and taking three swords with them, we think it clear that they intended to intimidate Mr. Boddam's servants into not opposing their entering upon the premises, which, from their relation with Mr. Boddam, they must have known he would have objected to their entering. It is true that they seem to have to some extent attempted to avoid discovery, but when accosted by Mr. Boddam's servants they persisted in their trespass, and endeavoured to prevent opposition by the false statement that they had been sent by the orders of the Bengal Government.

The trespass was most unwarrantable, and if it were to be tolerated that while two persons are litigating as to a property, one may go armed on to the property of which the other is in possession for the purpose of getting materials for an hostile application, breaches of the peace would be frequent.

We think, therefore, that the conviction must stand, and we do not think that the fine was under the circumstances excessive.

The rule is, therefore, discharged.

H. T. H. *Rule discharged.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF MOHUR MIR AND OTHERS *v.* THE QUEEN-EMPRESS,

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June 12.

and

IN THE MATTER OF THE PETITION OF KALI ROY AND OTHERS *v.* THE QUEEN-EMPRESS.

Sentence—Cumulative Sentences—Rioting—Distinct offences—Conviction for rioting and causing hurt and grievous hurt—Separate Conviction for more than one offence when acts combined form one offence—Abetment of grievous hurt during riot—Penal Code (Act XLV of 1860), *ss.* 147, 323, 325).

Six accused persons were charged with and convicted of rioting, the common object of which was causing hurt to two particular men. Four of the accused were also charged with and convicted of, respectively, causing hurt during the riot to the two men and a woman, and were sentenced to separate terms of imprisonment under ss. 147 and 323 of the Penal Code.

Held, that the sentences were legal.

During the course of a riot, in which *X* was attacked and beaten by several of the rioters, one of them *K* inflicted grievous hurt on *X* by breaking his rib with a blow struck with a *lathi*; *K* and three others of the rioters were charged with offences under ss. 147 and 325 of the Penal Code and *K* was convicted under those sections. The other three were convicted under s. 147 and also under s. 325 read with s. 109. Separate sentences were passed on *K* and also on the other three for each of the offences.

Held, that the sentences on *K* were legal, but that as there was nothing to show that the other three had abetted the particular blow which caused the grievous hurt, although they had each of them assaulted *X*, the conviction of them under s. 325 read with s. 109 could not be supported.

THE accused in the two cases which gave rise to these two rules were peons employed by a large zemindar named Mohunt Gopal Das, and the complainants in both cases were ryots of his, residing in a village called Damra. It was alleged that for a considerable time the zemindar had been trying, though unsuccessfully, to enhance the rents of his ryots, and this had led to numerous cases between him and the ryots. It was alleged that having failed to attain his object in the Civil Courts, he endea-

° Criminal Motions Nos. 202 and 203 of 1889, against the orders passed by J. Whitmore, Esq., Sessions Judge of Birbhoom, dated the 21st April 1889, modifying the orders passed by W. B. Brown, Esq., Sub-Divisional Magistrate of Rampore Haut, dated the 1st of April 1889.

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voured to break down the resistance by a system of petty persecutions, and that he kept a number of peons, amongst them the accused, for the purpose of watching the jungle and waste-lands of his villages, impounding the cattle of the ryots, and charging the ryots with theft when grass or bambcos were taken from the jungle. The occurrences which formed the subject-matter of these two cases were alleged to have taken place in carrying out the object of the Mohunt, and they took place on the same day. Some of the accused were charged in both cases.

In Rule No. 202, the following persons were charged: (1) Mohur Mir, (2) Kali Rai, (3) Tenu Sheikh, (4) Umed Sheikh, (5) Murad Sheikh, and (6) Makhan Singh or Rai.

In that case, it was alleged that the accused had been deputed to bring two ryots, named Prankristo and Lal Behary, to the zemindary cutcherry. The story told by the witnesses for the prosecution was shortly to the effect, that Prankristo, Lal Behary, and a woman named Khiroda were returning home from Futtehpore Hat to Damra in a cart, along with some others, when they were stopped by the accused and other peons of the zemindar, and after a conversation they were assaulted and beaten in a savage manner. Both Prankristo and Lal Behary were stripped of their clothes and beaten with *lathies*, and Rs. 21, which were tied up in Prankristo's *dhoti*, were taken away. On Khiroda calling for help, some of the peons attacked her and pulled off her ornaments, which they took away. After the assault the three persons named were left lying wounded on the spot of the occurrence. The defence consisted of *alibis* and was also based on the fact that no persons were named in the first information.

The Sub-Divisional Magistrate convicted all the accused of rioting, coming to the conclusion that the common object was the causing of hurt to Prankristo and Lal Behary. He further found that there was nothing to show that robbery was contemplated by the assembly, or that there was any idea of assaulting Khiroda till she raised an alarm. He convicted and sentenced the various accused as follows:—

Mohur Mir under s. 147, two years' rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, six months' rigorous imprisonment.

Kali Rai under s. 147, one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, one year's rigorous imprisonment.

Tenu Sheikh under s. 147, one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323 for causing hurt to Prankristo, six months, and under s. 392 to an additional six months.

Umed Sheikh and Murad Sheikh under s. 147, to one year's rigorous imprisonment and a fine of Rs. 200, or six months.

Makhan Singh or Rai under s. 147, to one year's rigorous imprisonment and a fine of Rs. 200, or six months. Under s. 323, for causing hurt to Khiroda, six months, and under s. 392, to an additional six months.

All the accused were further ordered to be bound over to keep the peace for three years.

The accused all appealed to the Sessions Judge who set aside the conviction of, and sentences passed against, Kali Rai, Tenu Sheikh, and Makhan Singh, under s. 392, but upheld all the other convictions and the sentences passed thereon, with the exception of reducing the fines inflicted on all the prisoners save Kali Rai from Rs. 200 to Rs. 30, and in the case of Kali Rai, and three others, he reduced the fine from Rs. 200 to Rs. 50.

In Rule No. 203, the persons charged were—

(1) Makhan Singh, (2) Tenu Sheikh, (3) Murad Sheikh, and (4) Kali Rai.

In that case the prosecution alleged that one Kuree Ram was going alone from upper to lower Damra, when some 12 or 14 peons came up to him and asked him to go to the cutcherry. On his refusal to go, on the ground that it was too late, he was immediately attacked. He was mauled and knocked down by Mohur Mir and beaten with *lathies* by Tenu Sheikh and Kali Rai, the latter of whom hit him a blow on the side which fractured one of his ribs. Then all the peons fell on him and gave him a miscellaneous beating, and stripped him of his clothes and left him. The defence in this case was practically the same as in the other. The Sub-Divisional Magistrate convicted all the accused under s. 147 and sentenced them each respectively to six months' rigorous imprisonment and a fine of Rs. 200, or six

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months. He convicted Kali Rai of causing grievous hurt under s. 325 and sentenced him to one year's rigorous imprisonment and he convicted the other three under ss. 325 and 109 of abetting the causing of greivous hurt by Kali Rai, and sentenced them to three months' rigorous imprisonment; and he further ordered all the accused to be bound over to keep the peace for three years.

On appeal, the above convictions and sentences were upheld by the Sessions Judge, except that the fines in all cases were reduced from Rs. 200 to Rs. 30.

In both cases, an application was made to the High Court under its revisional powers to send for the records and set aside the convictions and sentences upon numerous grounds, and amongst them upon the ground that separate punishments for component parts of the same offence ought not to have been inflicted, and that the sentences were illegal.

Two rules were issued which now came on to be arued.

Mr. *Woodroffe* and Baboo *Rajendro Nath Bose* for the petitioners in both cases.

Mr. *Kilby* for the Crown.

The only question argued at the hearing of the rules material for the purpose of this report, was that relating to the legality of the sentences.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows :—

We have heard these two rules together.

In the first of them (Rule 202), six prisoners have been convicted and sentenced by the Magistrate. On appeal to the Sessions Judge, the sentences were in some respects modified. As they stand at present, four of the accused have been convicted of, and sentenced for, offences falling under ss. 147 and 323 Indian Penal Code, and the only question which we have to consider is whether these sentences were legal.

Mr. Woodroffe contended that separate sentences under those sections could not be imposed, relying upon a decision of a Full Bench of this Court, given in the appeal of *Nilmoni Poddar* v. *Queen-Empress* (1). That decision has, we think, no

(1) I. L. R., 16 Calc., 442.

application to the facts of the present case. The decision in question dealt with the liability of one rioter for offences actually committed by another rioter. It in no way affects the question of the liability of a rioter for the acts committed by himself. The Judges who referred that case to the Full Bench did not refer the appeals of the persons who actually committed acts of grievous hurt, but dismissed the appeals of those persons. In the Full Bench Case, Tottenham, J., says : " The actual perpetrator is unquestionably punishable both for rioting and for any further offence he commits," and for this proposition of law there is ample authority—see *Queen-Empress* v. *Ram Sarup* (1).

In the present case the accused have been separately convicted and punished for acts committed by themselves in the course of the riot. Kali Roy is convicted of having voluntarily caused hurt to Prankristo by hitting him with a *lathi*. Makhan Roy is convicted of having caused hurt to Khiroda by hitting her with a *lathi*. Tenu Sheikh, of having caused hurt to Prankristo, by hitting him with a stick, and Mohur Mir, of having caused hurt to Prankristo, by hitting him with a shoe.

We are of opinion, therefore, that the sentences passed upon those persons are legal.

Mr. Woodroffe further drew our attention to a passage in the judgment in *Lokenath Sarkar* v. *Queen-Empress* (2) which runs as follows : " If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting ; but the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted, and the two men wounded." Without assenting to the proposition of law, as thus laid down, we would remark that in this case also the evidence shows that the offence of rioting was committed before Prankristo and his companions were actually struck. The accused, who appear to be zemindary peons, were deputed to bring Prankristo and Lal Behary to the zemindary

(1) I. L. R., 7 All., 757. (2) I. L. R., 11 Calc., 349.

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cutcherry; and they appear to have used considerable violence to them in attempting to do so before they struck them.

In the second case (Rule 203), Kali Rai has been convicted and sentenced both for rioting under s. 147 and under s. 325 for voluntarily causing grievous hurt to Kuree Ram by breaking one of his ribs; and the other three accused have been convicted and sentenced under ss. 147 and 325 read with s. 109, that is to say, for abetting the causing of grievous hurt to Kuree Ram by Kali Rai. We do not think that the conviction under this latter section was right, inasmuch as although the evidence shows that they themselves beat Kuree Ram, there is nothing to show that they abetted Kali Roy in inflicting the particular blow which broke his rib. We think, therefore, that these three accused should have been acquitted on that head of the charge, and we accordingly set aside that portion of the conviction and the sentence of three months' rigorous imprisonment imposed in respect of it.

In other respects we discharge the two Rules.

Rule 202 discharged.

H. T. H. *Rule 203 made absolute in part.*

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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June 24.

IN THE MATTER OF THE PETITION OF KHEPU NATH SIKDAR AND OTHERS (PETITIONERS) *v.* GRISH CHUNDER MUKERJI (OPPOSITE PARTY).*

Criminal Procedure Code (Act X of 1882), ss. 195, 439, 476—Sanction for prosecution—Order for prosecution—Jurisdiction of High Court in revision to quash orders under s. 476 of the Criminal Procedure Code.

The High Court is competent in the exercise of its revisional powers to interfere with an order of a Subordinate Court, whether made under s. 195 or under s. 476 of the Criminal Procedure Code, directing the prosecution of any person for offences referred to in those sections. The High Court, under s. 439, has the powers conferred on a Court of appeal by s. 423 to alter or reverse any such order.

Before a Court is justified in making an order under s. 476, directing the prosecution of any person, it ought to have before it direct evidence,

* Criminal Motions Nos. 241, 242, and 243 of 1889, against the orders passed by Baboo Mohim Chunder Ghose, Deputy Magistrate of Nattore, dated the 7th of May 1889.

fixing the offence upon the person whom it is sought to charge, either in the course of the preliminary enquiry referred to in that section, or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that the person had been guilty of an offence; but there must be distinct evidence of the commission of an offence by the person who is to be prosecuted.

When a Subordinate Magistrate, after trying a case, sent the record to the District Magistrate with a suggestion that certain persons ought to be prosecuted under s. 211 of the Penal Code, the High Court held that this did not constitute a sanction to prosecute.

Queen v. *Baijoo Lal* (1), and *In the matter of the petition of Kali Prosunno Bagchee* (2) followed.

ON the 19th of December 1888 one Khepu Nath Sikdar, a hotel-keeper at Nattore, lodged an information at the police-station that he had missed from his box in his hotel certain gold and silver articles, and that he suspected one Grish Chunder Mukerji and the other lodgers of having committed theft in respect thereof. The local police investigated the case and sent up Grish Chunder Mukerji, in whose house it was alleged one of the stolen articles was found. In the course of the trial before the Deputy Magistrate of Nattore, Grish Chunder Mukerji set up the defence that the charge was a false one, preferred at the instigation of the Mohunt of Tarkeshar in the District of Hughli, because he, Grish Chunder Mukerji, had refused to permit his wife to go to the Mohunt who wanted her for an immoral purpose. Before the case for the prosecution against Grish Chunder was closed, the Deputy Magistrate examined witnesses tendered by the accused, and rejected the prayer of the complainant Khepu Nath Sikdar for summoning all his witnesses. Thereupon Khepu Nath Sikdar moved the District Magistrate of Rajshahi (Mr. H. A. D. Phillips) to transfer the case to the file of some other Magistrate, but the District Magistrate refused the application, and in his order of refusal, dated the 23rd April 1889, made the following remarks:—

"The issues are no doubt of grave importance, but I see no reason for transferring the case from the file of the Sub-Divisional Magistrate, and I accordingly reject the application. At the same time I feel sure the Sub-Divisional Magistrate will

(1) I. L. R., 1 Calc., 450. (2) 23 W. R., Cr., 39.

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recognise the extreme gravity of the case and do his best to sift the matter to the bottom and get at the truth. If the case is false it is one which should certainly be followed by the prosecution of Khepu for false charge, and of the Mohunt also for abetment of the same were there any chance of proving such an abetment. On the other hand, if the theft be true and the allegation about the Mohunt be false, then Grish deserves to be punished for wanton defamation."

The case was then again taken up by the Deputy Magistrate, who, after examining some more witnesses on the 7th May 1889, acquitted the accused; his judgment being in the following terms:—

"On the 20th December last, Khepu Sikdar, a hotel-keeper of Nattore Upper Bazar, instituted a case of theft in a building, at the Nattore Police-station, and stated that the stolen property consisted of a new pair of golden *balas* and four pieces of silver anklets. He charged Abinash Chunder Bayragy and Kalachand Acharji, of Tarkeshar, and the present accused, Grish Chunder Mukerji, of Bhanjipore, near Tarkeshar, in the district of Hughli, with the theft, alleging that they had been lodgers in his hotel from the day before that on which the theft occurred. Head constable Dino Bandhu Ghose, of Nattore Station, took up the investigation. He went to Tarkeshar with Khepu Sikdar. On searching the house of Grish Chunder Mukerji, he obtained a piece of *bala* under a window, which Khepu Sikdar identified as one of the pair that had been stolen. The Head Constable, however, reported the case to be entirely false for reasons set forth in the "B" Form, in which the case was reported. After the receipt of the Head Constable's report I communicated the matter to the District Magistrate, and, at the same time, having regard to the important issue involved in the case, suggested to him the desirability of having an enquiry made through the Magistrate of Hughli by some trustworthy police officer under him. The Sub-Inspector of Haripal made the investigation, and reported Khepu's case to be true. It would have been a good thing, if some officer other than the Sub-Inspector of Haripal had made the investigation, for Tarkeshar is within

Haripal, and the Sub-Inspector of that place did not, in my opinion, act quite independently in this matter. After receipt of his report the District Magistrate ordered the original case to be tried. No reliable witness has been produced by Khepu Sikdar; but, on the contrary, the evidence of certain witnesses examined by me and a consideration of the entire circumstances leave no room for doubt in my mind that Khepu's case is entirely a got-up one, the result of a deep-laid conspiracy to ruin Grish and others.

"Grish has a handsome-looking young wife, and the Mohunt of Tarkeshar was anxious to get hold of her. Here is something like history repeating itself in connection with the Mohunt, for who has not heard of the incidents connected with the Mohunt, Elokeshi, and Nobin? In order to keep her out of the Mohunt's way Grish had to remove his wife to her paternal residence at Sonamukhi, in the district of Bankura. I have examined the wife of Grish, Kristokamini by name. She is a tender girl of about 16, and is now *enciente*. In spite of her delicate condition, Grish produced her before me, fetching her from Sonamukhi, as it had been alleged by Baboo Mohim Chandra Moitra, Mukhtear, under instruction from Khepu Sikdar, for whom he appeared, that the wife of Grish was a girl of only 7 or 8 years of age. Baboo Mohim Chandra Moitra, when he came to know that Khepu had given him false information as regards the age of Kristokamini, declined to act on his behalf. The deposition of Kristokamini shows how the vile woman 'Chotaginni' acted as a pimp to win her over to the Mohunt. There is some writing of Grish in a *khata* produced by Khepu Sikdar (*vide* Exhibit A). Grish has explained how he was made to write in the *khata* by Khepu Sikdar. It was done after Grish was released on bail from the *hajut*. It should be mentioned that I put Grish into *hajut* when the police first produced him before me. Grish stated from the very beginning that he had never been to Nattore before the institution of this case. I find no possible reason why Grish should come to Nattore. Can it be supposed that he came merely to commit the theft and then fly off? If so, what made him give his true address, as he was a stranger to this place? Is it possible that, after giving his address, he

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would be so careless as to take the ornament home, and not dispose of it somewhere on the way? The ornament was found under a window under very suspicious circumstances, and where anybody might have thrown it. Khepu has no wife; he lives here with a mistress, and is altogether a notorious character. It is said that he made the ornaments for his brother's wife; what could he say, having none of his own? I consider the allegation to be entirely false, for he does not seem to be such a rich man as to invest money for ornaments for his brother's wife. Again, is it possible that he kept the ornaments in a broken box in the midst and in the presence of strangers? The evidence leaves no doubt in my mind that Khepu acted as a mere tool in the hands of Mohendra Mukerji, employed under the Chotataraf Rajbati. It is in evidence that he had deposited a considerable sum of money with the Rajbari treasurer, and that it was under his order that Rati Kanta Karmakar prepared the ornaments. Mohendra, it should be mentioned, is a relative of the present Sub-Inspector of Nattore, and has a relative in the person of Panchcowrie Mukerji, of Dhaniakhali, employed under the Mohunt. It is in evidence that Panchcowrie happened to be in Nattore about the time when Khepu's case was instituted. He is a resident of Dhaniakhali, in the district of Hughli, and the report of the Sub-Inspector of Haripal was sent from that place. Witness Prasannanath Bhaduri, who has given evidence as to how the plot was hatched by Mohendra, has produced a letter marked A, with its envelope, with the post-mark of Haripal on it. The letter purports to have been written by Panchcowrie to Mohendra in connection with the case. If Khepu's case was true, what business had Mohendra and Panchcowrie to mingle in it, and what business had they to get up a false case unless it was to further the interests of the Mohunt, who had cause to be annoyed with Grish, not only for his failure to get hold of his wife, but also for his giving evidence against him in a certain case. I need not enter into further details. The plot, to say the least, is the most mischievous and nefarious that I have ever come across; its sole object was to wreak vengeance on a supposed enemy, if not also to put Grish out of the way, and so facilitate the

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Mohunt's intrigue with his wife. I consider Grish to be an innocent man, as far as Khepu's case is concerned. As some evidence for the defence has been taken, the prisoner ought to be acquitted. He has therefore been formally charged to-day, and he has pleaded not guilty. I acquit Grish Chunder Mukerji under s. 258 Criminal Procedure Code and direct that he be set at liberty. The records of the case will be submitted to the District Magistrate for prosecution of Khepu Sikdar under s. 211 Indian Penal Code, and of Mohendra Mukerji and Panchcowrie Mukerji for abetting the same. All these persons may be tried under any other section of the Penal Code that may be found applicable. A list of witnesses for the prosecution will be attached to the record."

After the above order was passed, the case was taken up by Mr. Ainslie, Deputy Magistrate of Rampore Baulia, who described himself in his order as "Deputy Magistrate in charge," and he issued warrants for the arrest of the three persons referred to in the above order. Those three persons accordingly moved the High Court to quash the sanction or direction given by the Deputy Magistrate of Nattore for their prosecution under s. 211 of the Penal Code. On those applications three rules were issued, calling upon the Deputy Magistrate to show cause why his order should not be set aside; and similar rules were issued upon Grish Chunder Mukerji, because it appeared from the affidavit of one of the petitioners that the Deputy Magistrate had asked the pleaders of Grish Chunder Mukerji whether he would like to prosecute the complainant in the event of a prosecution under s. 211 being sanctioned, and that thereupon the pleader had replied in the affirmative. These three rules now came on for disposal.

In Rule No. 241—Mr. *Woodroffe*, Baboo *Umbica Churn Bose* and Baboo *Gopi Nath Mookerjee* for the petitioner, Khepu Sikdar.

In Rule No. 242—Mr. *M. Ghose*, Baboo *Jogendro Nath Bose* and Baboo *Kamini Kumar Gohu* for the petitioner, Panchcowrie Mukerji.

In Rule No. 243—The *Advocate-General* (Sir *G. C. Paul*) and Baboo *Gopi Nath Mukerjee* for the petitioner, Mohendra Mukerji.

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Baboo *Ram Charan Mitter* for the Deputy Magistrate in all three rules.

Mr. *Hill* and Baboo *Iswar Chunder Chuckerbutty* for Grish Chunder Mukerji, the opposite party, in all three rules.

Baboo *Ram Charan Mitter*, in showing cause, contended that the Deputy Magistrate of Nattore had given no sanction to any individual under s. 195 of the Criminal Procedure Code, and that therefore the High Court had no power to quash the order under the provisions of that section. If an order under that section had been passed, the petitioners ought to have gone to the Sessions Judge in the first instance. Moreover, the High Court had no power to quash an order for prosecution, which did not amount to a sanction. *Queen Empress* v. *Rachappa* (1).

On the merits he contended that, though the Deputy Magistrate was not justified in referring in his judgment to the previous history of the Mohunt of Tarkeshar, which was not in evidence before him, the evidence recorded by the Deputy Magistrate was sufficient to justify him in directing a prosecution under s. 476 of the Criminal Procedure Code.

Mr. *Hill* claimed the right to address the Court on behalf of Grish Chunder Mukerji, who had been called upon to show cause.

TREVELYAN, J., enquired if Mr. Hill intended to argue that no sanction had been given by the Deputy Magistrate under s. 195 Criminal Procedure Code.

Mr. *Hill* informed the Court that it would be his contention that no sanction had been accorded by the Deputy Magistrate to any private individual.

TREVELYAN, J.—In that case, Mr. Hill, you have no *locus standi* on your own showing, and we rule that you are not entitled to be heard.

Mr. *Woodroffe*, on behalf of Khepu Sikdar in Rule No. 241.—Whether the order of the Deputy Magistrate is to be regarded as a sanction under s. 195, Criminal Procedure Code, or as a direction by the Court under s. 476, the High Court is equally

(1) I. L. R., 13 Bom., 109.

competent to deal with it. If the order is to be regarded as a sanction, it can be revoked by the High Court under the provisions of s. 195, Criminal Procedure Code; and if the order be one made under s. 476, the revisional powers of the High Court are large enough to enable it to set it aside. Any order in a judicial proceeding is liable to be altered or reversed by the High Court in its revisional jurisdiction—Section 439. Similar orders have been quashed in the case of *Queen* v. *Baijoo Lal* (1), following the earlier case of *In the matter of the petition of Kali Prosunno Bagchee* (2). On the merits, the case has been so irregularly and improperly tried by the Deputy Magistrate, that no weight ought to be attached to his conclusions. There is nothing to show that a theft had not really occurred, and that the charge of Khepu Nath Sikdar was false.

Mr. *M. Ghose*, who appeared on behalf of Panchcowrie Mukerji in Rule No. 242, was stopped by the Court on the ground that there was no evidence against his client.

The *Advocate-General*, who appeared on behalf of Mohendra Mukerji in Rule No. 243, contended that his client never having been examined in the case by either side, the Deputy Magistrate had no right to direct his prosecution; and that the evidence against him was wholly inadmissible and incredible on the face of it.

The following judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was delivered by

TREVELYAN, J.—This is an application to set aside an order of the Deputy Magistrate of Nattore, dated 7th May 1889, by which he directs that the records of a case, brought by Khepu Nath Sikdar against Grish Chunder Mukerji, be submitted to the District Magistrate for the prosecution of Khepu Sikdar under s. 211 of the Indian Penal Code, and of Mohendra Mukerji and Panchcowrie Mukerji for abetting this offence. He then goes on to say:—"All these persons may be tried under any other section of the Penal Code that may be found applicable. A list of witnesses for the prosecution will be attached to the record." That order being made, and the record being sent, whether to the Magistrate or where does not appear, an

(1) I. L. R., 1 Calc., 450. (2) 23 W. R., Cr., 39.

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order was made by Mr. E. F. Ainslie, who describes himself as "Deputy Magistrate in charge," directing issue of warrants against these three persons for their arrest, and fixing a day for the hearing; and directing, furthermore, that the case should remain on his file.

This case has been argued at some length. The *first* question is as to what this order of the 7th May means; the *second* is whether we have jurisdiction under the revision powers conferred upon us to set aside this order; and the *third* question is whether, under the circumstances of this case, we ought to exercise such powers in favour of the persons who have applied to us.

One view of this order of the 7th May is that it amounts to a sanction to prosecute. Another view of this order is that it is an order made by the Deputy Magistrate under the provisions of s. 476 of the Criminal Procedure Code, sending the case for inquiry or trial to the Magistrate of the District. There is a third view of this order: it is one that is sought to be supported by an order of the Magistrate of the District, dated 23rd April, on an application made to transfer the case from Nattore. In that order, after some observations having no reference to the matter of the application made before him, the Magistrate said this:—"At the same time, I feel sure the Sub-Divisional Magistrate will recognize the extreme gravity of the case, and do his best to sift the matter to the bottom, and get to the truth. If the case is false, it is one which should certainly be followed by the prosecution of Khepu for a false charge, and of the Mohunt also for abetment of the same, were there any chance of proving any such abetment. On the other hand, if the theft be true, and the allegation about the Mohunt be false, then Grish deserves to be punished for wanton defamation." It has been urged that the order made by the Deputy Magistrate has been suggested by the order of the Magistrate, and is intended to be in compliance with it. With regard to the first view, we think it clear that this order does not mean to give Grish Chunder sanction to prosecute. It does not purport to do so; and unless it did, it is difficult to see how it amounts to a sanction to prosecute. It only really submits

the case to the District Magistrate to be dealt with under s. 211, if he thinks proper to do so, and the remark,—"All these persons may be tried under any other section of the Penal Code that may be found applicable,"—really means that, if a prosecution is instituted under s. 211, and it turns out that there are other sections under which these persons can be tried, they may be so tried. That does not assist us in construing the order. It does not show that sanction was given to Grish Chunder to prosecute. Whether this order may be construed in either of the two other ways that I have pointed out, is, we think, immaterial. In either case, we think it is an order that we can deal with, and we think that we can also deal with the order that has resulted from it, *viz.*, the issue of warrants. The practical effect of either of these two constructions is the same. If we have power to interfere with an order under s. 476, we have equally power to interfere with a matter of this kind in which the Deputy Magistrate, having tried the case, makes an order sending the record with an invitation to the District Magistrate to prosecute. If this amounts to simply sending the case to the District Magistrate to deal with it under s. 211 of the Penal Code, then it is not a sanction to prosecute. If it is an order under s. 476 of the Criminal Procedure Code, then the considerations arise to which we will presently refer, *viz.*, whether there was any necessity for a preliminary inquiry, and whether the absence of such preliminary inquiry has vitiated the inquiry purporting to be made under that section. We have ample jurisdiction to interfere on a question of this kind. In the first place we have the terms of the Criminal Procedure Code, which clearly show that we have such jurisdiction. Under s. 439, the High Court, in exercising its powers of revision, has the powers conferred on a Court of Appeal by s. 423 to alter or reverse an order of the lower Court. So that we have the same power to alter or reverse an order of this description as an Appellate Court would have in a case of appeal. This construction, we think, is confirmed by the cases cited in which different benches of this Court have interfered with orders made under this section, or under the corresponding section in the earlier Act. The cases to which we have been referred are first

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the case of *Queen* v. *Baijoo Lall*, (1) decided by Macpherson and Morris, JJ., and there is an earlier case, namely *In the matter of the petition of Kali Prosunno Bagchee* (2).

There being jurisdiction, and the order being in the way described, the question arises whether this is a case in which we ought to interfere. We think that the Magistrate ought not to have made this order, and that there is no ground for his order. There is no doubt that before proceedings under s. 476 can be instituted, either there must be a preliminary inquiry held by the Magistrate, and in such inquiry there must be direct evidence fixing the offence upon the persons whom it is sought to charge, or in the earlier proceedings out of which this enquiry arises, there must be direct evidence charging these persons with an offence. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that these persons had been guilty of an offence. The law as laid down in the cases clearly shows, that before a Magistrate can proceed at all under that section, he must either in the case before him or in the inquiry which he must make have distinct evidence on the commission of an offence. If the order is to be construed in accordance with the third view we have mentioned, we equally think that it could only be made upon the footing that there was before the Magistrate direct and substantial evidence of the commission of an offence.

The learned Judges then proceeded to consider the evidence in all the rules, and concluded as follows:—

It is clear to us that on the evidence in this case, the Magistrate was not justified in taking steps beyond the acquittal of Grish Chunder.

That being so we must set aside the order made by him of the 7th May 1889, beginning with the words,—"The records of the case will be submitted * * * * *"——down to the end.

And further we direct that the order made by Mr. Ainslie and the warrants issued by him be quashed.

Rules made absolute.

H. T. H.

(1) I. L. R., 1 Calc., 450. (2) 23 W. R., Cr., 39.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Hill.

SARASWATI DASI (DEFENDANT No. 1) *v.* HORITARUN CHUCKERBUTTI AND ANOTHER (PLAINTIFFS) AND SRIRAM SHAHA AND OTHERS (DEFENDANTS).*

1889 *April* 26.

Limitation—Bengal Tenancy Act (VIII of 1885), Sch. iii, art. 3—Suit by occupancy ryot to recover possession after dispossession by landlord —Question of title—Possessory suits—Bengal Act VIII of 1869, s. 27.

A suit by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord, in which the title of the tenant is denied and put in issue, is governed by the special period of limitation prescribed by the Bengal Tenancy Act, Sch. iii, art. 3, namely, two years from the date of dispossession.

It was intended by that enactment to provide for all suits to recover possession of land brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff; and not to provide only for suits of a possessory nature such as were previously dealt with by s. 27 of Bengal Act VIII of 1869.

THE plaintiffs sued to recover possession of a *jote*, alleging in their plaint that their father, and they themselves after him, had been in possession of the *jote* until 1291 (1884); that the *jote* was a permanent and transferable one; and that they had acquired a right of occupancy, but the defendants had, in 1291, illegally dispossessed them. In the plaint their cause of action was alleged to have accrued from the year 1291; in their evidence they stated it to have arisen from Assar 1291. The suit was instituted on the 16th June 1886.

The defendants pleaded that the plaintiffs' father had relinquished the *jote*, and that the plaintiffs had not acquired a right of occupancy; they also pleaded that the suit was barred by limitation, having been instituted more than one year from the date of dispossession.

The Munsiff dismissed the suit on the ground of limitation, holding that the suit ought to have been brought within one year

* Appeal from Appellate Decree No. 1225 of 1888, against the decree of W. H. Page, Esq., Judge of Moorshedabad, dated the 24th of April 1888 reversing the decree of Baboo Bunkim Chunder Mitter, Munsiff of Kandi, dated the 27th of June 1887.

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from the dispossession, under s. 27, Bengal Act VIII of 1869, the period of one year having expired before the Bengal Tenancy Act (which repealed Bengal Act VIII of 1869) came into operation.

The Judge on appeal reversed this decision on the point of limitation, which is the only one material to this report. He said:

(1) "The Munsiff grounds his judgment chiefly on the decision of Sir Richard Garth, C.J., in the case of *Imam Buksh Mundul* v. *Momin Mundul* (1), but there is in my opinion an important difference between that case and the present one which the Munsiff has overlooked. In that case the plaintiffs sued, alleging that their father had been in possession of a certain *jote*, and that on his death the plaintiffs and other co-sharers succeeded to the *jote* and had been in possession until the time when they were illegally dispossessed by the landlord: the landlord apparently did not dispute the possession either of the plaintiffs' father or of the plaintiffs and their co-sharers, but alleged that the plaintiffs and their co-sharers had voluntarily relinquished the *jote*. In the present case the landlord denies that the plaintiffs were ever in possession, alleging that their father voluntarily relinquished possession: here is a distinct denial of the plaintiffs' title, and therefore under the rulings cited by the plaintiffs' pleader [*Joyunti Dasi* v. *Mahomed Ali Khan* (2), and *Basarut Ali* v. *Altaf Hosain* (3)], I am bound to hold that the ordinary rule of limitation applies, and that the suit is not barred by any special rule under the provisions of the former Rent Law."

From this decision the first defendant, Saraswati Dasi, appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Srish Chunder Chowdhry* for the appellant.

Baboo *Karuna Sindhu Mukerjee* for the respondents.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

This is a suit brought by an occupancy ryot to recover possession of land of which he has been dispossessed by his landlord.

(1) I. L. R., 9 Calc., 280. (2) I. L. R., 9 Calc., 423.
(3) I. L. R., 14 Calc., 624.

Under the decisions of this Court, it is settled law that the suit could have been brought within twelve years from the date of dispossession, inasmuch as the title of the tenant was disputed and put in issue in the case. The matter which we are called upon to decide is whether this rule, which has been long in force in this Court, has been affected by the limitation prescribed in the Bengal Tenancy Act, sched. iii, art. 3. It is there enacted, that a suit to recover possession of land claimed by the plaintiff as an occupancy ryot must be brought within two years from the date of dispossession. Section 184 of the Bengal Tenancy Act declares that suits specified in sched. iii of the Act shall be instituted within the time prescribed in that schedule for them respectively. It seems to us that by this enactment, it was intended to provide for all suits to recover possession of land which might be brought by an occupancy ryot, and to limit the period previously allowed by the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff. There is nothing in the terms of the law to lead us to suppose that the Legislature provided only for suits of a possessory nature, such as were previously dealt with by s. 27 of Bengal Act VIII of 1869. There is no saving clause in the Bengal Tenancy Act in favour of suits which might have been brought under the law previously existing by occupancy ryots, to recover possession of lands of which they had been dispossessed. Consequently, we are of opinion that even if the plaintiff had twelve years or a portion of twelve years to bring this suit when the Bengal Tenancy Act came into operation, he was, by its operation, restricted to two years from the date of his dispossession. The cause of action, that is to say, the date of dispossession, has not been clearly stated by the plaintiff in his plaint. It is stated to be from the year 1291. In the evidence given, it is made more precise and stated to be from Assar 1291. It is contended by the plaintiff that the expression 'up to Assar 1291' necessarily implies, from the end of Assar, which would bring this suit within the period prescribed by the Bengal Tenancy Act; but this was clearly not so understood by the first Court, and we are not prepared to say upon this vague expression that the suit is not barred. It is rather for

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the plaintiff to show that his suit has been brought within time and in the absence of evidence to the contrary, we must take it that the dispossession took place from the commencement of Assar. In this view the suit would be barred. We accordingly dismiss the suit, setting aside the judgment of the lower Appellate Court, and restoring that of the first Court, with costs of this and the lower Appellate Court.

J. V. W. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Hill.

NILMONY SINGH DEO (DECREE-HOLDER) *v.* BIRESSUR BANERJEE AND OTHERS (JUDGMENT-DEBTORS).*

1889 *June* 17.

Civil Procedure Code, 1882, *s.* 230—*Application to transfer decree for execution—Application for execution of decree—"Granting" application, Meaning of—Issue of process.*

An application to the Court which passed a decree for a certificate to allow execution to be taken out in another Court, is not an application for the execution of the decree within the terms of s. 230 of the Code of Civil Procedure.

The "granting" of an application under that section includes the issue of process for execution of the decree.

THIS was an application for execution of a decree obtained on the 7th August 1875, in the Court of the Collector of Manbhoom. Between 1875 and 1887, applications were, from time to time, made in the Manbhoom Court for execution of the decree, in two of which applications some money was realized. On the 26th July 1887, the decree-holder applied to the Manbhoom Court for a certificate to enable the decree to be executed in the district of Burdwan. The decree having been transferred to the Burdwan Court, an application was made to that Court on 23rd May 1888, for the issue of a warrant of arrest against the judgment-debtor, and he was, under the provisions of s. 245*B* of the Civil Procedure Code (see s. 2, Act VI. of 1888), called upon to show cause why he should not be committed to jail in

* Appeal from Order No. 82 of 1889, against the order of R. F. Rampini, Esq., Judge of Burdwan, dated the 12th of December 1888, affirming an order of Baboo Madhub Chunder Chuckerbutty, Subordinate Judge of Burdwan, dated the 16th of August 1888.

execution of the decree. The judgment-debtor objected that the execution of the decree was barred by lapse of time under s. 230 Civil Procedure Code, and the Subordinate Judge upheld this objection, and dismissed the application on that ground; and the Judge, on appeal, came to the same conclusion. The decree-holder appealed to the High Court on the grounds that the application of the 23rd May 1888 was in continuation of the application of the 26th July 1887; that no previous application had been made and granted under s. 230 of the Civil Procedure Code; and that therefore the execution of the decree was not barred under that section.

Mr. *Woodroffe* and Baboo *Upendro Chundra Bose* for the appellant.

Baboo *Rash Behari Ghose* and Baboo *Srish Chundra Chowdhry* for the respondents.

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

The decree in this suit was passed on the 7th August 1875. It was kept alive from that time until the 26th July 1887. On that date, an application for a certificate was made to the Deputy Collector of Manbhoom, the Court by which the decree was passed, to allow execution to be taken out in the Civil Court at Burdwan. The application, no doubt, was made in the form prescribed in s. 235, but the last column, clause (*i*), was necessarily vague in respect of the attachment of particular properties. The decree was sent for execution to Burdwan by a proceeding dated 13th April 1888, and was received on the 4th May following. Execution has been refused under s. 230 of the Code, it being found that more than twelve years have elapsed from the date of the decree, and that this matter fell within that section, inasmuch as a previous application had been made to execute the decree under s. 230, and had been granted. It is contended in second appeal by Mr. Woodroffe, first, that the application to the Deputy Collector of Manbhoom, dated 26th July, was an application to execute the decree within the terms of s. 230, and that the subsequent proceedings at Burdwan could only be properly regarded as proceedings in continuation

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and in furtherance of that application. In our opinion, the application made at Manbhoom was not an application to execute the decree, but an application to send the decree for execution by a Court which alone was competent to execute it in the manner desired. The Court at Manbhoom could have no power to execute a decree at Burdwan. The law, in our opinion, contemplates that in such a case the Court which passed the decree is competent only to transfer it for execution in the manner directed by s. 224, but that the application for execution should be made to the Court which has jurisdiction to issue processes in order to enforce payment of the money decreed. We therefore regard the application of the 26th July 1887, as an application merely to transfer the decree for execution, and not an application for the execution of the decree itself. The District Judge relies upon the case of *Dewan Ali* v. *Soroshibala Dabee* (1) as explaining the meaning of the granting of an application to execute within s. 230. It is unnecessary for us to discuss this matter, and to consider whether it is, as found in that case, to be equivalent to admitting an application within the terms of s. 245, or something beyond that, because we have no doubt that it includes the issue of a process for execution of the decree. In this case we have had brought to our notice two instances in which such processes issued and money was realized in part satisfaction of the decree, so that it is clear that the applications to execute, which were applications before the present application, were granted within the terms of s. 230. The decree-holder may or may not have cause to complain of the delay in the transmission of the decree from Manbhoom for execution to Burdwan, but that is not a matter which is relevant in the case now before us. Section 230 of the Code of Civil Procedure permits of no extension of the term specified, except for reasons which do not apply to this case. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 8 Calc., 297.

Before Mr. Justice Prinsep and Mr. Justice Hill.

UMESH CHUNDER DUTTA AND OTHERS (DECREE-HOLDERS) *v.* SOONDER NARAIN DEO AND OTHERS (JUDGMENT-DEBTORS).* 1889 *June* 18.

Limitation Act, 1877, art. 179—Application to take a step in aid of execution—Opposing application to set aside sale in execution of decree.

The appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of art. 179 of sch. ii. of the Limitation Act to take a step in aid of execution. The application contemplated by that article is an application to obtain some order of the Court in furtherance of the execution of the decree (1).

THIS was an application for execution of a decree, dated 8th March 1877. The only question was whether or not execution was barred by lapse of time. The previous proceedings in execution, so far as they are material, were as follows:—

On the 26th June 1883, up to which time the decree had been kept alive, an application was made to execute it, and on the 17th August 1883, an order was passed for the issue of proclamation of sale of certain property which had been attached. On the 21st November, the sale of the property took place. On the 14th December 1883, the judgment-debtors applied that the sale should be set aside on the ground of irregularity, and on the same day an order was made to serve notice on the decree-holders, the 19th of December being fixed for hearing the application. On that day the application was heard, the decree-holders appearing by pleader, and opposing the application, but it was allowed, and the sale set aside.

The next application was filed on the 7th December 1886 but this, after various orders had been made upon it, was struck off for default. The present application was made on the 21st May 1888, within three years of the last previous application of 7th December 1886. To support the decree, however, it became necessary to show that the application of

* Appeal from an Order No. 96 of 1889, against the order of Baboo Dwarka Nath Bhuttacharjee, Subordinate Judge of Midnapore, dated the 17th of December 1888, affirming an order of Baboo Bhuban Mohan Gangulí, Munsiff of Midnapore, dated the 18th of August 1888.

(1) See *Shib Lal* v. *Radha Kishen*, I. L. R., 7 All., 898.

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7th December 1886 was not barred, and for this purpose it was now contended that the period of three years should be calculated from the appearance of the decree-holder by pleader on the 19th December 1883, and that that opposition was an application to take some step in execution of the decree within art. 179, sch. ii of the Limitation Act. Both the lower Courts held that execution of the decree was barred.

The decree-holders appealed to the High Court.

Baboo *Nilmadhab Sen* for the appellants.

Baboo *Umbica Charan Bose* and Baboo *Umakali Mukerjee* for the respondents.

The following cases were referred to:—*Radha Prosad Singh* v. *Sundur Lall* (1), *Kewal Ram* v. *Khadim Hosain* (2), *Kristo Coomar Nag* v. *Mahobat Khan* (3), *Rajkumar Banerjee* v. *Rajlakhi Dabi* (4), and *Shib Lal* v. *Radha Kishen* (5).

The judgment of the Court (PRINSEP and HILL, JJ.) was as follows:—

The lower Courts have concurrently held that this application to execute is barred by limitation.

The appellants' pleader contends that the application is within three years, inasmuch as it was within three years from the date of the appearance of his pleader to oppose an application made by the judgment-debtor to set aside the sale held in execution. We agree with the lower Court that the appearance of the pleader to oppose the proceedings taken by the judgment-debtor cannot properly be regarded as an application within the terms of art. 179 to take some step in aid of execution. It seems to us rather that the application, contemplated by that article of the Limitation Act, is an application to obtain some order of the Court in furtherance of the execution of the decree. The appearance of the pleader cannot be regarded as any such application. The appeal is therefore dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 9 Calc., 644. (2) I. L. R., 5 All., 576,
(3) I. L. R., 5 Calc., 595. (4) I. L. R., 12 Calc., 441.
(5) I. L. R., 7 All, 898.

PRIVY COUNCIL.

MUHAMMAD YUSUF KHAN (DEFENDANT) *v.* ABDUL RAHMAN KHAN (PLAINTIFF).

*P. C.** 1889 *February 20.*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Superintendence of High Court—Code of Civil Procedure (Act XIV of 1882), s. 622.

A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code.

APPEAL by special leave (31st December 1886) from an order (June 22nd, 1886), of the Judicial Commissioner of Oudh.

The suit out of which this appeal arose was brought on the 2nd April 1883, by the present respondent, in the Court of the Subordinate Judge of the Lucknow District, against the appellant, for a declaration that a document purporting to have been signed by the plaintiff on the 1st June 1882, and undertaking that he should pay Rs. 30 a month to the defendant, was a forgery. The defence was that the document was genuine, and to this was added that it had been decided, in a previous suit, so to be.

The Subordinate Judge, on 17th December 1883, found the document genuine, and dismissed the suit. This decree was upheld by the District Judge of Lucknow on the 11th June 1884. According to his judgment, two words, not however material to the effect of the writing, had been added. No appeal (ss. 584 and 585 of Act XIV of 1882) lay to any Appellate Court against these concurrent judgments, but the Judicial Commissioner, on application by the plaintiff, consented, as he conceived himself to be empowered by s. 622 of the Code of Civil Procedure to do, to revise the proceedings of the District Judge. He did so, reversing the decree which had been made in the defendant's favour, and granting to the plaintiff the relief which he sought, on 10th November 1884. His ground for doing so was that, as the District Judge had found that two

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words had been added to the disputed document, this threw upon the defendant the burthen of showing when they had been added, and as he had offered no evidence upon the point, it was the duty of the District Judge to assume that they had been added after execution, and therefore that he should have cancelled the document. This Judicial Commissioner, Mr. Young, left the Court shortly after this decision, and his successor, Mr. Tracy, on 23rd February 1885, reversed the decision of his predecessor, being of opinion that, even if the District Judge had been wrong, his error was not one that could be set right under s. 622. The Courts had found that the document which the plaintiff had sought to cancel was genuine. He quoted the judgment in *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) as follows: "It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity." This gave to him, as he considered, no alternative but to find that the order of 10th November 1884 was passed without jurisdiction, and obliged him to set aside this order, which seemed to have followed an erroneous ruling of a Full Bench of the Allahabad High Court, *viz.*, *Moulavi Muhammad* v. *Syed Hussan* (2). The result was to restore the decision of the District Judge dismissing the suit.

In 1886, Mr. Young resumed charge of the office of Judicial Commissioner, and to him the plaintiff applied to set aside the last order, *viz.*, that of 23rd February 1885. This application was granted on 22nd June 1886, by the order now under appeal. The Judicial Commissioner pointed out that the application was for the review of an order made in review, prohibited by s. 629; he also considered s. 622 to be inapplicable. But he referred to two cases in which orders made were revised, *viz.*, *Tafuzzal Hossein Khan* v. *Raghonath Pershad* (3) and *Rajender Narain Rae* v. *Bejai Govind Singh* (4); and, on the supposed ground that the order of 23rd February 1885 was one which the Court

(1) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237.
(2) I. L. R., 3 All., 203.
(3) 7 B. L. R., 186.
(4) 2 Moore's I. A., 209, 252.

would not have made, if it had been duly informed, reversed it, and restored the order of 10th November 1884.

Special leave to appeal was granted, in regard to the law, by order dated 31st December 1886.

Mr. *J. D. Mayne* for the appellant, submitted that, even if the decision of the District Judge of 11th June 1884 was wrong (which it was not), still his error could not be taken to be within the meaning of s. 622. The order of 23rd February 1885 was accordingly right. The final decision of the Judicial Commissioner of 22nd June 1886 was wholly without jurisdiction.

After his statement of the case, their Lordships called on Mr. *C. W. Arathoon*, for the respondent, who argued that Mr. Young's first order, *viz.*, that of 10th November 1884, was right. The question of the materiality of an addition to a document was a question of law,—*Yame* v. *Lother* (1); and the point that the District Judge had omitted to consider afforded ground for revision. He referred to *Amrit Lal* v. *Madho Das* (2); *Amir Hussan Khan* v. *Sheo Baksh Singh* (3).

No reply was called for.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN.—In this case, on the 10th of November 1884, Mr. Young, the Judicial Commissioner of Oudh, set aside the judgment of a competent Court, which by law was final, and without appeal. In so doing, he proceeded on an erroneous interpretation which had been placed on s. 622 of the Civil Procedure Code by the Court of Allahabad, and in ignorance of the fact that the error had been corrected by a judgment of this Board in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (3), to which Her Majesty gave effect by Her order of the 26th of June 1884. The order of Mr. Young was brought before Mr. Tracy, who happened at the time to be officiating as Judicial Commissioner in his place. On the 23rd of February 1885, Mr. Tracy, having regard to the decision of the Privy Council, discharged the order of Mr. Young. Fifteen months afterwards the matter was again brought before Mr. Young on an application purporting to be

(1) L. R., 1 Ex. D., 176. (2) I. L. R., 6 All., 292.
(3) I. L. R., 11 Calc., 6 : L. R., 11 I. A., 237.

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made under s. 622. That application was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects.

On the 22nd of June 1886, Mr. Young discharged the order of Mr. Tracy on the singular ground that it was made *per incuriam*, and that it was an order which the Court would not have made if it had been duly informed. From that order of Mr. Young, special leave to appeal to Her Majesty has been granted.

Mr. *Arathoon*, who appeared for the respondent, admitted that he could not contend that Mr. Young had any jurisdiction to pronounce the order of the 22nd June 1886, but he argued that Mr. Tracy's order was wrong, and that Mr. Young's first order was right.

Their Lordships, however, are of opinion that Mr. Tracy was perfectly right in discharging the first order of Mr. Young; and that neither of Mr. Young's orders can be supported upon any ground whatever.

Their Lordships therefore are of opinion that the order of the 22nd of June 1886 ought to be reversed, and the order of the 23rd of February 1885 affirmed, and that the respondent should pay the costs of the proceedings before Mr. Young, in which the order of the 22nd June 1886 was made. They will therefore humbly advise Her Majesty accordingly; and the respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Young, Jackson, & Beard.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

C. B.

LUCHMAN SINGH (DEFENDANT) *v.* PUNA AND ANOTHER (PLAINTIFFS).

P.C.* 1889 *February* 21 & 22.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

Second Appeal—Code of Civil Procedure (Act XIV of 1882), ss. 584, 585—Jurisdiction to hear a second appeal, on what matters—Admission of secondary evidence—Evidence Act (I of 1872), ss. 65, 66.

Under ss. 584 and 585 of the Code of Civil Procedure 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure.

On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the original Court, the only questions were (1), whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2), whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document.

Held, that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of fact of the first Appellate Court.

Both the above questions were decided in the affirmative by their Lordships: the *first*, on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (I of 1872), ss. 65,66: the *second* also in the affirmative, because, the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine.

APPEAL from a decree (13th February 1886) of the Judicial Commissioner, modifying a decree (12th May 1885) of the Commissioner of the Jubbulpore Division, which varied a decree (9th March 1885) of the Deputy Commissioner of the Jubbulpore District.

The suit giving rise to this appeal related to a question of title, and the main question of fact between the parties was decided

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by the Courts in succession (1) in favour of the plaintiffs, respondents. They alleged that Ramchandra their father, by gift from one Kali Baboo, was the proprietor of village Natwara, and upon their father's death his widow Massammat Munna, who succeeded, allowed the defendant appellant to manage for her; with the result that he purchased in his own name other villages out of the profits of Natwara. Such villages they claimed as the heirs of their father on the death of their mother in 1884. They claimed also buildings and moveables.

The defendant's case was that Natwara descended from Kali to his daughter Munna, who made a gift of it on 23rd August 1870 to the defendant, with other property. He had other matters of defence; but this much is all that is necessary to explain what was the deed of gift alleged to have been made by Kali.

Both the original Court, the Deputy Commissioner, and the Court of First Appeal, the Commissioner, found the alleged gift to Ramchandra to have been made. But the original deed of gift was not forthcoming, and a copy was admitted in evidence.

As to this, the Judicial Commissioner, in his judgment on appeal preferred to him under ss. 584 and 585 of the Code of Civil Procedure 1882, expressed the opinion stated in their Lordships' judgment; and refused to hold that the Courts below had been wrong in admitting it in evidence.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant for whom the argument mainly was that there was no legal proof that Kali had made the gift in question.

The respondents did not appear.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The sole question raised in this appeal is a question of fact, whether Kali Baboo made a gift of his estate to Ramchandra, under whom the respondents claim. If there

(1) When the suit was filed, 23rd July 1884, the Act giving the series of the Courts was XIV of 1865, then in force. On the 1st January 1886, when the suit was pending in the Judicial Commissioner's Court, Act XVI of 1885, the Central Provinces Civil Courts Act came into operation, repealing the former, and again stating the Courts in their order.

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was no such deed of gift, the title of the appellant is a good one, but if there was, then the respondents, being the heirs of Ramchandra, are entitled to the decree which they have got.

The question has been before three Courts, and they have all decided in favour of the gift. They have held that it is proved by a deed of which secondary evidence was given.

The case is not only within the general rule which this Committee observe, that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure. The third Court was the Judicial Commissioner, and to him the appeal was what is called in the Code a second appeal. Section 585 of the Code of 1882 says :—"No second appeal shall lie except on the grounds mentioned in s. 584." Those grounds are : "The decision being contrary to some specified law or usage having the force of law, or the decision having failed to determine some material issue of law or usage having the force of law," or for substantial defect in procedure. It is not alleged here that there is any defect of procedure. Therefore, in order that this appeal may succeed, there must be some violation of law.

This Committee is sitting on appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. No special leave to appeal from the decree of the Commissioner has been applied for, and their Lordships find that they are bound by his findings of the facts. Therefore the only questions here are, *first*, whether a case arose for admitting secondary evidence, which was a proper question of law ; and, *secondly*, whether the evidence that was admitted was really and truly secondary evidence.

With regard to the case for admitting secondary evidence their Lordships refer to the Evidence Act of 1872. It says :— "Secondary evidence may be given of the existence, condition, or contents of a document in the following cases." Two of the cases are : "When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when the original has been destroyed or lost, or when the party offering evidence of its

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contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

In this case there is evidence of two witnesses, of whom certainly one, and probably both, assisted at what they call a ceremony, in which Kali Baboo made over the property to Ramchandra, and told the people present, the villagers, the ryots or cultivators, that Ramchandra was the malik. There is the evidence of one witness that he was present at the signing of a deed, which he says was stated to be a deed of gift from Kali Baboo to Ramchandra, and there is the evidence of another witness that Kali Baboo told him that there had been such a deed of gift. Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence, cannot be doubted. The Courts below have found that all the documents belonging to the estate passed into the hands of the appellant, and therefore that the deed in question is in his power, or has been destroyed or lost,

Then what is the secondary evidence which is let in ? It is a copy of a deed which was filed in another suit, and is still on the records of the Court. That deed is endorsed: " Copy in accordance with the original," and it is signed by the Judge presiding in the Court. Their Lordships accept the opinion of the Judicial Commissioner upon the value of that copy. His words are these: "There can be no doubt that the Judge, in the course of the suit in 1864, did accept and file, with the proceedings, a copy of a deed of gift by Kali Baboo, and the only question is whether that copy had been compared with the original, when the copy is enfaced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorized to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy." Their Lordships entirely concur with that opinion. When the copy is looked at it establishes the deed of gift on which the respondents rely.

There was another question raised with respect to some goods and chattels—some moveable property. It was said that the

appellant, having been in possession of the estate rightfully under a deed of gift from Ramchandra's widow, was entitled to the income during that time, and the Judicial Commissioner has, to a certain extent, given effect to that contention by adjudicating to the appellant the ownership of some villages which it appears that, during that period, he purchased out of the surplus or savings from the income. But besides the land, he received a certain quantity of chattels, which we may call stock and plant, and it is now contended that, as the original stock and plant must have worn out, and the appellant was not under any obligation to replace it, therefore that which he has in fact brought in to replace it belongs to him, and not to the estate. So far as there is stock and plant belonging to the three villages, which the Judicial Commissioner has adjudicated to the appellant, that he takes. But with regard to the other property which forms part of the estate which is adjudicated to the respondents, their Lordships think that the appellant is in the position of an ordinary tenant for life who enjoys furniture and plant which wears out from time to time, and which he replaces, and that that which is found attached to the property which the respondents receive must follow the title to that property, and that the decree of the Judicial Commissioner is right in not giving to the appellant any more stock or plant than belongs to the three villages which he has given to him.

The result is that the appeal fails in every respect, and their Lordships, therefore, must humbly recommend Her Majesty to dismiss it. There will be no costs, as the respondents do not appear.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B. *Appeal dismissed.*

* *P. C.* 1889 *February* 23, 27 *and April* 3.

HEMANGINI DASI (PLAINTIFF) *v.* KEDARNATH KUNDU CHOWDHRY (DEFENDANT).

[On appeal from the High Court at Calcutta.]

Hindu Law—Partition—Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutaváhana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widows is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is the mother.

Jeeomony Dossee v. *Attaram Ghose* (1) referred to and approved.

APPEAL from a decree (29th July 1886) of the High Court (2), reversing a decree (11th April 1885) of the Second Subordinate Judge of the Hughli District.

The question raised on this appeal related to the rights of a widow to maintenance, her deceased husband having left sons, of one of whom she was the mother, and a partition taking place among them.

The object of the suit was to establish against the whole estate of the deceased, Taracharan Kundu Chowdhry, who died in April 1865, the right of the plaintiff as his widow to maintenance; and when it was instituted on the 13th September 1884, there had been no partition among his sons, who were Hurrish Chunder, his son by the plaintiff, and two other sons by a wife who predeceased her husband, *viz.*, Kedernath and Annoda Pershad. The latter dying in 1882, left a widow and two minor sons, whose guardian was Kedarnath. The latter, the present respondent, represented when this suit was brought two-thirds of the paternal estate.

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(1) Macnaghten's Cons. H. L., p. 64.

(2) I. L. R., 13 Calc., 336.

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On the 11th November 1884, after the institution of this suit, Hurrish Chunder brought two other suits against Kedarnath himself, and in his capacity of guardian of the wards, for an account and a partition of the joint estate of Taracharan deceased. Hemangini Dasi, the plaintiff in this suit, was stated in Hurrish Chunder's plaints to have been made a party by reason of her having instituted this suit; but no issue was recorded, or decided, as to her rights to maintenance; and, on the 20th February 1886, decrees in those two suits, declaring Hurrish Chunder's right to one-third of his father's estate generally, directed an account and partition.

In the present suit the widow claimed a decree for Rs. 300 for her maintenance, and Rs. 200 for religious observances, and that these sums might be declared charges on the whole estate of the late Taracharan. By the effect, however, of the decrees for partition obtained by Hurrish Chunder, whom his mother had made a defendant along with Kedarnath (though Hurrish Chunder did not defend or appeal), two principal questions arose in the present suit, which had been instituted before the other two suits. These questions were the following:—

The first of them was whether the Courts below, when dealing with the question as to the plaintiff's right as a widow to have suitable maintenance awarded to her out of the entire estate of her late husband, were justified in taking into their consideration a state of facts, *viz.*, the decrees above referred to for partition which did not exist till after the institution of the present suit. And the second question was, assuming the affirmative of the first, whether the effect of a partition between the plaintiff's step-son and step-grandchildren on the one side, and her own and only son on the other, by which partition the latter took a separate third share, was or was not, by Hindu law, to discharge Kedarnath's and his wards' two-thirds shares from the plaintiff's claim for maintenance, limiting that claim to the share of Hurrish Chunder, her own son, both in matter of amount and as regards security.

As to the first of these questions, the Subordinate Judge was of opinion that, as the present suit was instituted before the partition proceedings, the latter would not affect the plaintiff's

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claim. And as to the second, he referred to the case, relied on by the respondent, of *Jeeomony Dossee* v. *Attaram Ghose*, cited at p. 64 of Sir F. Macnaghten's Considerations on Hindu Law, where a point is stated as to whether a mother (not a party to that suit) of an only son, her husband having left other sons was entitled on partition between her son and the other sons to a separate share; and it was determined that she was not so entitled, but must look to her son for maintenance. And the Subordinate Judge was of opinion that, as the mother referred to in that case was not a party to the suit, the question as to her right never properly rose in her absence, and the decision could not guide him.

He made a decree for what he considered to be a suitable maintenance (allowing no arrears or back maintenance) *viz.*, Rs. 180 by the year; and he directed that the appellant might realize two-thirds of this amount from the respondent, as representing two-thirds of the entire estate, and the remaining one-third from the share of her son, Hurrish Chunder.

Kedarnath appealed to the High Court, the plaintiff cross-appealing, because the decree gave her less than she claimed.

The High Court (Petheram, C. J., and Ghose, J.) did not maintain the judgment of the first Court, but, as to the first of the above questions, held that they were bound to take the subsequent partition into consideration, and to make such a decree as would be consistent with the true estate of the family, as it existed at the time they were dealing with it.

As to the second question, they held that, up to the time of the decree for partition defining the separate shares of the members of the family, the plaintiff was entitled to claim her maintenance against the whole estate; and subsequently thereto, to claim her maintenance only against the share allotted to her son: but that, as after a separation between the sons and Hemangini in February 1883, the latter had received her maintenance from her own son Hurrish Chunder alone, she had no claim for maintenance against her step-sons; with the result that so far as Kedarnath and his wards were concerned, the suit ought to be dismissed.

Accordingly, reversing the decree of the lower Court, the High Court dismissed the suit against him; and their decree declared

the plaintiff entitled, from the time of her separating from her son, Hurrish Chunder, to be paid by him out of that portion of the estate of his late father Tarachand Kundu now in his hands, Rs. 150 a month as maintenance. The judgment of the High Court is reported in I. L. R, 13 Calc., 336.

The plaintiff, having obtained a certificate that the suit fulfilled the requirements of s 596 of the Civil Procedure Code, appealed to the Queen in Council, on the ground that she had a right to maintenance out of the whole estate of her deceased husband, upon which the charge for her maintenance should continue, even after partition amongst her son and step-sons.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the High Court was wrong in holding the effect of the partition to be to make the maintenance of this widow a charge only on her own son's share in the family estate, and proportionate only to the value of that share. They contended that, on the contrary, by the Hindu law, the widow's maintenance was regarded as a charge upon, and proportionate to, the whole estate of her deceased husband. It was in conformity with the family distribution made by that law that the widows should share, and share alike, in the whole estate. It had been rightly taken as beyond a doubt, in the High Court, that her maintenance, if she had been childless, would have been a charge on the whole estate, not affected by any partition. Also, a widow having sons but no step-sons, and having lived with them whilst the family continued joint, would be on a partition entitled to a share equal to that allotted to a son, and her rights might be shown by supposing a case of a widow having three sons of her own, there being three other sons not by her; in such a case her right would be to have a one-seventh share in the whole estate, and not merely a one-fourth of a half. There was no authority for a change being made in the widow's position, as a consequence of a partition which she could neither bring about nor avert. The right of a widow to her maintenance arose by marriage. It existed during the life of the husband, who could not free himself from it, and it attached upon the whole inheritance which he left, immediately upon his death.

Reference was made to Strange's Hindu Law, Edn. 1830, Vol.

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I, pp. 171, 291, Vol. II, Appendix to Chap. VIII, pp. 290, 307; Dayabhaga, Chap. III, sec. 1, para. 12, and sec. 2, paras. 29, 30, and 31; Macnaghten's Principles of Hindu Law, Vol. I, Chap. IV, of Partition, Vol. II, Chap. V; Jaganatha Colebrooke's Transl., Book V; Macnaghten's Cons. on Hindu Law, p. 60: *Jeeomony Dossee v. Attaram Ghose* (1); *Sheodyal Tewaree* v. *Jadunath Tewaree* (2); *Nittokissoree Dassee* v. *Jogendronath Mullick* (3); *Madhavkeshav Tilak* v. *Gangabai* (4).

It was in regard to the mother's rights over the father's estate that she had her claim to maintenance and to a share; and there was no authority for the opinion that the mother took a share of her son's share. It was incorrect to say that a widow's maintenance was a charge on a son's share; it being, on the contrary, a charge that took priority of any rights upon partition, that dated from her marriage, that affected the whole estate of her husband as a charge thereon; and a charge which like the husband's debts must be provided for. More than one text supported the view that it was a charge upon the whole estate.

Strange's Hindu Law, Vol. I, Chap. Partition; Vol II, Precedent at pp. 351, 352, 353, with notes by Ellis, Colebrooke, and Sutherland, at the latter page; West and Buhler, Hindu Law (Bombay) p. 791.

Her share, if she took a share, was a charge on the whole property in the hands of all the sons. She was an inchoate heir till she had issue, and with her original right to charge the whole estate she remained, that right being paramount to the son's right to partition. This was not, in effect, contravened by the decision in *Sorolah Dassee* v. *Bhoobun Mohun Neoghy* (5). The mother's right was to maintenance attaching over the whole estate; but, if she took a share in lieu, her right was to a share equal to that of her son, and this was the measure of it.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, argued in support of the decision of the High Court. The question was completely covered by the authority of decided cases, according to which the plaintiff, on the partition of the family estate, was entitled to have her maintenance charged

(1) Macnaghten's Cons. H. L., p. 64.
(2) 9 W. R., 62.
(3) L. R., 5 I. A., 55, 56.
(4) I. L. R., 2 Bom., 639.
(5) I. L. R., 15 Calc., 292.

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upon and paid out of the share of her own son only, she not being entitled to charge the shares of her step-sons, as well as that of her own son. Upon the partition, the widow ceased to belong to one family with the step-sons, and had no claim upon their shares in the divided estate.

Reference was made to Jaganatha's Digest (Colebrooke), Book V, Chap. II, para. 89, and a sentence in the Commentary thereon referring to the opinion of Jímútaváhana and the rest; Dayabhaga, Chap. III.

Sir F. W. Macnaghten, in his "Considerations" published in 1824, cited decisions of 1809, 1811 and 1813, (see p. 39; also pp. 48, 51, 60, 66 and 75) showing that this was the settled law in 1814.

In 1821, there was the decision in *Krisnanund Chowdree* v. *Rookeenee Dibia* (1); and in 1866, there was a case to the like effect in *Cally Churn Mullick* v. *Janova Dassee* (2) decided by Mr. Justice Phear.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on a subsequent day (3rd April) by

SIR R. COUCH.—The appellant is the widow of Taracharan Kundu, who died on the 19th of April 1865. He left one son, Hurrish Chunder, by the appellant, and two sons, Kedarnath (the respondent) and Annoda Pershad, by another wife who died before him. Annoda Pershad died in June 1882, leaving a will by which Kedarnath was appointed executor of his estate. The suit was brought on the 13th September 1884 by the appellant, against Kedarnath in his own right and as executor to the estate of Annoda Pershad, and against Hurrish Chunder, and the plaint prayed to have it held that the plaintiff was entitled to get Rs. 500 a month from the properties left by her husband, for the expenses of her religious acts and her maintenance, and that the Rs. 500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs. 3,016-9-3 on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing, on

(1) 3 Sel. Rep. (1827), p. 70. (2) 1 Ind. Jur., N.S., 284.

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the 6th December 1884, of a written statement by Kedarnath, Hurrish Chunder, who attained his majority on the 3rd November 1882, instituted two suits against Kedarnath, and others, members of another branch of the family, who were co-sharers with Taracharan in different properties, for a partition of the joint family property. This was stated in the written statement of Kedarnath, and it was pleaded that, if the plaintiff was entitled to any maintenance, her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th February 1886, decrees for partition were made in those suits. The judgment of the High Court, on appeal from the Subordinate Judge, was given on the 29th July 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition, the plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had separated in food and worship, she having been maintained in the family of her son could not claim maintenance from her step-sons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against Kedarnath.

The decision as to the arrears has not been questioned before their Lordships, and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by Taracharan remained joint and undivided, the plaintiff was, no doubt, entitled to claim her maintenance out of the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of her son's share? According to the Dayabhaga, Ch. III, sec. 1, vv. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives, the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow

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that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to Jímútaváhana, it is a settled rule that a widow shall receive from sons who were born of her, an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. (Colebrooke's Digest, Book V, Ch. II, v. 89, 3rd Ed., Vol. II, p. 255.) In Sir F. Macnaghten's Considerations on Hindu Law, p. 64, a case in the Supreme Court of *Jeeomony Dassee* v. *Attaram Ghose* is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, Attaram, by Luchapriah the other; and it is said that it was understood and admitted that Luchapriah was not entitled to any separate property upon a partition made between her only son and his three half-brothers, and that she was to look to him for her maintenance.

The Subordinate Judge, in his judgment, said the question who was to give the maintenance never properly arose in that suit in the absence of Luchapriah, and if any such question was then decided, it was an *obiter dictum*. The question did arise between Attaram and his half-brothers, and if the contention of the present appellant, that the maintenance is a charge upon the estate and to be taken into account in making the partition, is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75, where a man had three sons by his first wife, two by his second, and two by his third, and all survived him. In a suit for partition, it was declared, in accordance with the authority in Colebrooke's Digest, before noticed, that the first wife was entitled to one-fourth of the three-seven parts of her sons, and the second wife to one-third of the two-seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

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The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate; and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Tottenham, Mr. Justice Trevelyan, Mr. Justice Ghose and Mr. Justice Beverley.

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July 15.

QUEEN-EMPRESS *v.* SARAT CHANDRA RAKHIT.*

Sessions Judge, Jurisdiction of—Sanction to prosecute by District Judge—Trial by same Judge as Sessions Judge—Criminal Procedure Code (Act X of 1882), ss. 195, 487—*Penal Code, s.* 196.

A Sessions Judge is not debarred by s. 487 of the Criminal Procedure Code from trying a person for an offence punishable under s. 196 of the Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure.

* Full Bench on Criminal Appeal No. 327 of 1889, against the decision of F. H. Harding, Esq., Officiating Sessions Judge of Chittagong, dated the 11th March 1889.

Madhub Chunder Mozumdar v. *Novodeep Chunder Pundit* (1) overruled; *Empress* v. *D'Silva* (2) referred to.

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THIS was a reference to a Full Bench by Mr. Justice Trevelyan and Mr. Justice Beverley; the referring order was as follows:—

"The appellant before us has been convicted under s. 196 of the Penal Code of using as genuine evidence which he knew to be false. He has also been convicted under s. 471, read with s. 467, of the Penal Code; but, in our opinion, the alleged offence falls under s. 196, and the conviction under s. 471 should be set aside. The conviction under the latter section has made no difference in the punishment.

"The sanction to prosecute was given by Mr. F. H. Harding acting as District Judge of Chittagong.

"The appellant has been tried and convicted of this offence by Mr. Harding acting as Sessions Judge of Chittagong.

"One of the grounds of appeal is as follows: 'While the Judge accorded a sanction to bring a case against me in the Criminal Court, it has been illegal on his part to convict and punish me against himself.'

"This question has been argued before us by the Deputy Legal Remembrancer, who cited the case *In the matter of Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (1), and we have had to consider the terms of ss. 477 and 487 of the Criminal Procedure Code. We have grave doubts as to the correctness of the above-mentioned decision, and as the matter is one of importance, we refer to a Full Bench the following question:—

"'Can a Sessions Judge try a person for an offence punishable under s. 196 of the Indian Penal Code, when he has, as District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?'

"If this question is decided in the affirmative, the appeal should, in our opinion, be dismissed. If it be decided in the negative, the appellant will have to be re-tried by another Sessions Judge."

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown,—There being only one Court in each District, which can try

(1) I. L. R., 16 Calc., 121. (2) I. L. R., 6 Bom., 479.

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Sessions cases, or hear most appeals, great inconvenience must be occasioned when such cases are transferred. In the present instance the nearest Sessions Court is at Tipperah; the most convenient perhaps at Alipore. In the one case witnesses would have to march 200 miles during the rains to Tipperah and back, or else recross the Bay of Bengal. A Bench of this Court has decided that if the Judge had jurisdiction to try, the conviction and sentence are right: upon a re-trial then either the same sentence will be repeated, or there will be a miscarriage of justice. The law could not have intended to prescribe a course entailing such consequences unless there exists an imperative reason for so doing. That reason can only be the fear that the Judge may have prejudged the case and condemned the prisoner before trial; but the District Judge in this case merely amended a sanction previously granted by an inferior Civil Court.

If an appeal admitted after hearing the judgment and argument, if a rule to show cause why an order could not be set aside, are not prejudged, how can it be said that a Judge granting a sanction to prosecute (where he merely has to consider whether he ought to remove an artificial obstruction put in the way of a man's ordinary right to complain of an offence) has condemned the accused before the hearing.

It would be more plausible to say that the Sessions Judge had prejudged the case, when, after reading the proceedings of the commitment, he alters or adds to the charge. The prisoner has been acquitted of all the charges framed by the Magistrate, but sentenced upon the one which the Judge has framed in this case. And as to this there is no objection, for the law prescribes it. Section 477 clearly shows that where the offence is committed in the presence of the Judge, and where he has himself committed the offender for trial, the Legislature does not consider that a sufficient reason to justify the removal of the case from his jurisdiction.

So under s. 487 the Sessions Judge may try offences which have been committed in his presence as District Judge, and where the preliminary enquiry and commitment have been made by himself. Clearly it was not contemplated that he should be debarred from trying a case like the present.

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I submit that s. 487 does not debar him. The words "no Judge of a Criminal Court" in s. 487 apply to an Assistant Sessions Judge (s. 31) but not to a Sessions Judge. The Sessions Judge (ss. 477, 478) may try any case committed to his Court, whether by himself or by any Civil or Revenue Court that thinks he ought to try it; *à fortiori* he may try any case committed to his Court in the ordinary way by a Magistrate. If it be argued that s. 477 is restricted to cases in which the Sessions Judge himself makes the commitment, such a narrow construction is inconsistent with s. 478. I also submit that the words "judicial proceedings" in s. 487 do not include a sanction under s. 195 granted or revoked by a Superior Court. In dealing with such sanction, such Court has no authority to take evidence; and it cannot therefore be a judicial proceeding [see s. 4 (*d*)]. Whenever in any proceeding evidence may be legally taken the Code provides for it, as in appeals (Chap. XXXI, s. 428); but no such provision is to be found in Chap. XV, or as applicable to the Superior Courts mentioned in s. 195. The case of *Krishnanund Das* v. *Hari Bera* (1) decides that notice need not be given to the accused when sanction is granted for his prosecution. How then could evidence be taken in such a case? Again, an offence which is brought under the notice of the District Judge in a proceeding, as in this case, is not brought under the notice of the Sessions Judge "as such Judge." The Court of Sessions which tries the offence, whether with Assessors or Jury, is a different Court from that of the Civil Judge—*Empress* v. *D'Silva* (2).

I contend that s. 487 only applies to cases which can be tried by more than one Judge or Magistrate in the District: and that it does not apply to Sessions Judges or to appeals involving for trial a transfer to another district. The words in s. 487 "shall try" do not apply to appeals; trials and appeals are quite distinct under the Code. The word "try" is confined to trials; appeals are heard under s. 407, rejected under s. 409, and dealt with under s. 428.—See *Weir*, 1081.

No one appeared for the prisoner.

(1) I. L. R., 12 Calc., 58. (2) I. L. R., 6 Bom., 479.

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The order of the Court (PETHERAM C. J., TOTTENHAM, TREVELYAN, GHOSE and BEVERLEY, JJ.,) was as follows:—

The facts of this case are sufficiently set out in the order of reference. The question referred to us for our decision is the following:—

"Can a Sessions Judge try a person for an offence punishable under s. 196 of the Penal Code, when he has, as a District Judge, given sanction for the prosecution under the provisions of s. 195 of the Code of Criminal Procedure?" The reference has been rendered necessary in consequence of the decision in *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (1).

Section 487 of the Code of Criminal Procedure now in force runs as follows:—

"Except as provided in ss. 477, 480 and 485, *no Judge of a Criminal Court or Magistrate*, other than a Judge of a High Court, the Recorder of Rangoon, and the Presidency Magistrates, shall try any person for any offence referred to in s. 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice *as such Judge or Magistrate* in the course of a judicial proceeding."

WE are of opinion that in this section effect must be given to the words "*as such Judge or Magistrate*," and the meaning of the section, we think, must be taken to be that when an offence referred to in s. 195 has been committed before a Judge of a Criminal Court or Magistrate, or in contempt of his authority, or brought under his notice in the course of a judicial proceeding, he cannot himself try such offence. That this is so, we think, is clear from the exception made in regard to the provisions of s. 477, under which a Court of Session is empowered to charge and commit, or admit to bail and try, any person who has committed before it any offence of the kind referred to in s. 195. It appears to us that it would be inconsistent to hold that a Sessions Judge may try an offence committed before him as Sessions Judge, and that he may not try such an offence if committed before him as District Judge.

This view appears to have been taken by the Bombay High Court in the case of *Empress* v. *D'Silva* (2). That was a decision under s. 473 of the Code of 1872, which

(1) I. L. R., 16 Calc., 121. (2) I. L. R., 6 Bom., 479.

section ran as follows: "Except as provided in ss. 435, 436 and 472, no Court shall try any person for an offence committed in contempt of its own authority." Under that section it was held that a Sessions Judge was not debarred from trying a case of forgery in which he had sanctioned the prosecution as a District Judge. The *ratio decidendi* in that case was much the same as that which has been indicated above. The learned Judges who decided that case said:—

"The Legislature seems to have been impressed by the sense of this inconvenience, and, consequently, in enacting s. 472 of the Code, it gave jurisdiction to the Court of Sessions to try all cases of contempt committed before it in which the offence is triable exclusively by the Court of Session. It would be difficult to suppose that the Legislature had any other intention in regard to offences of the same kind committed before the Judge of the Court of Session in his Civil capacity, and certainly s. 473 is not so worded as to oblige us to hold that there was any other intention."

It will be seen that s. 487 of the present Code, which corresponds to s. 473 of the Code of 1872, is couched in more definite language. The prohibition is restricted to a "Judge of a Criminal Court," and that being so, we think we must place a strict construction on the words "as such Judge," and hold that they do not include a Judge of a Civil Court or District Judge.

For these reasons we are of opinion that the Sessions Judge was not debarred by this section from trying the case which was the subject of this reference.

T. A. P. *Appeal dismissed.*

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

Before Mr. Justice Norris.

JOTENDRONAUTH MITTER *v.* RAJ KRISTO MITTER AND ANOTHER.* 1889 *July* 8.

Transfer of suit—Practice—Minor defendant. Application by next friend of, for transfer of suit when no guardian ad litem *has been appointed—Civil Procedure Code (Act XIV of 1882), ss. 440, 441, 443, 449.*

A suit was instituted in a Mofussil Court against two defendants, one of them being a minor. Before a guardian *ad litem* had been appointed for

* In the Matter of s. 13 of the Letters Patent of 1865, and in the Matter of a Suit No. 62 of 1889, in the Court of the Second Subordinate Judge of the 24-Pergunnahs.

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the minor defendant, an application was made to the High Court to transfer the case from the Mofussil Court to the High Court in its ordinary original civil jurisdiction by the minor defendant through a next friend. It was contended that the application was informal, and could not be granted, and that no such application could be made on behalf of the infant defendant until a guardian *ad litem* had been appointed, and then it should be made by him.

Held, that the objection should not prevail, and that this application could be made through the next friend.

In a partition suit, instituted in the Second Subordinate Judge's Court of the 24-Pergunnahs, the parties being residents of Calcutta, when the property sought to be partitioned consisted of (*a*) moveable property situate in Calcutta, (*b*) immoveable property, $\frac{19}{35}$ths, of which was in Calcutta, the rest being in the immediate vicinity, and when it appeared that, if tried in Alipore, an Ameen would have to partition the Calcutta property, and that the suit could be more expeditiously and cheaply tried in the High Court.

Held, that the case was a proper one to be transferred to the High Court to be tried on the original side, and an order was made accordingly.

THE facts which gave rise to the issue of this rule were as follow:—

Khetter Mohun Mitter, the paternal grandfather of the plaintiff, Jotendronauth Mitter who was an infant, died intestate in Calcutta, on the 28th day of March 1888, leaving two sons, Nilmadhub Mitter and Raj Kristo Mitter, one of the defendants an infant, and a widow Nobin Kissory Dassee the second defendant, and his mother, Bama Soondary Dassee. Nilmadhub Mitter was tried for and convicted of the murder of his father, Khetter Mohun Mitter, and sentenced by the High Court to transportation for life.

After the trial, Jotendronauth Mitter, who was the infant son of Nilmadhub, and his mother Nerodemoney Dassee, were ignored by the other members of the family of Khetter Mohun, and accordingly the above suit was instituted in the Court of the Second Subordinate Judge of the 24-Pergunnahs by Jotendronauth, through his mother as next friend, for a declaration of his right to a third share in the estate left by Khetter Mohun, and for partition. The suit was based on the contention that Nilmadhub was excluded from the right to succeed to his father's estate, and that his share devolved on the plaintiff.

The estate consisted of property, both moveable and immoveable, the latter being situated partly in Calcutta, within the original

jurisdiction of the High Court, and partly in the district of the 24-Pergunnahs.

Shortly after the suit had been instituted, an application was made to the High Court in the exercise of its extraordinary original civil jurisdiction on behalf of Nobin Kissory Dassee, the widow of Khetter Mohun, to have the suit transferred from the Court of the Second Subordinate Judge to the original side of the High Court. That application was resisted on behalf of the plaintiff on the ground that no guardian *ad litem* had been appointed on behalf of the infant defendant, Raj Kristo Mitter, and therefore that the application was informal, and could not be granted. The application was refused.

On the 6th June, another application was made by Mr. Pugh on behalf of the infant defendant Raj Kristo, for a rule calling on the plaintiff to show cause why the case should not be transferred to the High Court for trial. The application was based on a petition of Raj Kristo Mitter by Mohendronauth Ghose, his maternal uncle and next friend, and an affidavit of the said Mohendronauth Ghose.

Upon the application being made, a rule was directed to issue, calling on the plaintiff and the defendant, Nobin Kissory Dassee, to show cause why the transfer should not be made, and pending the hearing of the rule all proceedings in the suit in the Court of the Second Subordinate Judge were stayed.

At the time that application was made, and when the rule came on to be heard, no guardian *ad litem* had been appointed for the infant defendant, Raj Kristo Mitter, in the suit.

The rule now came on to be argued.

Mr. *Hill* on behalf of the plaintiff.

Mr. *Pugh* on behalf of the defendant, Nobin Kissory.

Mr. *Bonnerjee* on behalf of the defendant, Raj Kristo.

Mr. *Hill*, showing cause against the rule, contended that there was a preliminary objection to the form of the application, and the rule being made absolute, inasmuch as no guardian *ad litem* of the infant had yet been appointed, and neither under the procedure in England nor that of this country could an appli-

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cation of this kind be made by a next friend. For the procedure in England, he referred to Daniel's Chancery Practice, Vol. I, page 174. And as regards the procedure in this country, he pointed out that Chapter XXXI of the Code of Civil Procedure distinguished between next friends and guardians for the suit; the former term being used in respect of plaintiff minors, and the latter when the minors were defendants. He referred in particular to ss. 440, 441, 443, and 449, and to Belchambers' Rules and Orders (Rules 572 and 583), and contended that there was no precedent for an application such as this being made by a next friend on behalf of an infant defendant, and that no such application could be entertained till a guardian *ad litem* had been appointed.

On the merits, he contended that the suit should not be transferred. A portion of the property being situate in the 24-Pergunnahs, the plaintiff had a right to institute his suit there; and, as he considered that he would be put to much less expense there than if he had sued in the High Court, he had chosen to exercise that right, and there was no reason why the suit should be transferred.

Mr. *Bonnerjee*, in support of the rule, pointed out that the application was not made in a suit which was pending in the High Court, but in the matter of a suit pending in another Court, and therefore was one which was properly made by the infant defendant through a next friend. Even if a guardian *ad litem* had been appointed, this application would have had to be made by a next friend. Section 441 was clear on that point. An application could only be made by a guardian *ad litem* on behalf of an infant to a Court when the suit was actually pending in that Court. This application was therefore in order.

On the merits, he contended that the suit ought to be transferred. The parties all resided in Calcutta. The widow had received letters of administration to the estate from the High Court, limited during the minority of the plaintiff and Raj Kristo, and was accountable to the High Court. The whole of the moveable property was in Calcutta and immoveable property of the value of about Rs. 49,000 was also situate in Calcutta against about Rs. 36,000

worth situate in the district of the 24-Pergunnahs, and that was situate in the immediate Suburbs and close to Calcutta. There seemed no reason why the suit had been filed in the Subordinate Judge's Court other than that a relative of the plaintiff, who was looking after the case, was a pleader of that Court, and it suited his convenience to have it tried there. As to expense, he contended that this particular suit could be much better and more cheaply determined by this Court, with the machinery at its disposal, than in a Mofussil Court, and as the only question to be decided in the case was one of law, that could be decided on settlement of issues, and the expense of such suit in the High Court would be less than it would be in a Mofussil Court. This certainly was a case for the Court to exercise its power and transfer the suit to the High Court.

Mr. *Pugh* supported the application.

The judgment of the Court (NORRIS, J.) was as follows:—

This is an application to transfer a suit from the Court of the Second Subordinate Judge of the 24-Pergunnahs to this Court. The suit was instituted by a minor through his mother as next friend against his grandmother and uncle. The facts are of an extremely unusual character. The minor plaintiff is the son of one Nilmadhub Mitter, who was convicted last year at the criminal sessions, presided over by Wilson, J., of the murder of his father, Khetter Mohun Mitter, and sentenced to transportation for life. He now sues for partition of the family estate, alleging that his father, by virtue of his conviction, is disentitled to succeed to the estate, being civilly dead, and that he, his infant son, is entitled to step into his father's shoes, and is entitled to a partition. The suit is defended by the widow of the murdered gentleman and by the uncle, the uncle being a minor; and the defence is that, under Hindu law, the plaintiff is as much excluded from the inheritance as his father, and entitled to nothing more than maintenance. No guardian *ad litem* has been appointed to the infant in the suit at Alipore, and Mr. Hill objects that the application is not properly framed, because it is made by the next friend instead of the guardian *ad litem*. This is a new question. I have considered the authorities referred to by Mr. Hill, and am of opinion that the

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objection ought not to prevail. If a guardian had been appointed, he might have applied; but none having been appointed, it is open to the next friend to apply.

The next question is as to the transfer of the suit. On the evidence, I think I ought to make the order, and I will state the grounds on which I make it. The major portion of the property, *i.e.*, 49/85th., is in Calcutta. The remaining, 36/85th., though not within the ordinary original civil jurisdiction of this Court, is in the immediate vicinity of Calcutta. Secondly, if the plaintiff obtains a decree declaring his right to partition, the effect would be to make an Ameen of the Alipore Court the person to partition Calcutta property. I can hardly think of anything more inconvenient than that a Mofussil Ameen should be introduced into Calcutta to partition Calcutta property. In the third place, though I do not lay much stress on this reason, I believe this suit is one which can be more cheaply and expeditiously tried in this Court than in the Mofussil. On the whole, I think, for these reasons, that I ought to make the order.

Rule made absolute.

Attorney for Nobin Kissory Dassee and Raj Kristo Mitter: Baboo *Shamal Dhone Dutt.*

Attorney for Jotendro Nath Mitter: Baboo *Kali Das Bhunjo.*

H. T. H.

ORIGINAL CIVIL.

Before Mr. Justice Norris.

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July 13.

IN THE GOODS OF A. J. PRIMROSE (DECEASED.)

Practice—Power of Attorney—Evidence Act (Act I of 1872), s. 85—Letters of Administration, Application for.

On an application for letters of administration to the estate of a deceased, who was domiciled in Scotland, and to whose estate one *P* had been appointed executor *dative quâ Father*, the application being made by one *K* under a power of Attorney granted by *P*, such power not having been executed and authenticated in the manner provided by s. 85 of the Evidence Act,

Held, that the application must be refused.

THIS was an application in Chambers made on the 11th July for letters of administration (with effect throughout the whole of British

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India) to the property and credits of one Arthur John Primrose. The petitioner was one Andrew James Ker, a resident of Calcutta, and in his petition he stated that the deceased was in his life-time and at the time of his death a British subject domiciled in Scotland, a member of the Bengal Civil Service, and latterly residing at No. 22, Moray Place, Edinburgh, Scotland, and was not a person exempted under s. 332 from the operation of the Indian Succession Act; that he was drowned while crossing from Ostend to Dover on or about the 12th day of September 1888, leaving property and effects within the Presidency of Bengal to be administered unto; that he died without issue, and without having been married, and without having made any will or testament, or any other deed or deeds, instrument or instruments in writing, whereby the property he was possessed of, previous to his death, could be legally disposed of; that Bouverie Francis Primrose, who was the father of the deceased, had been appointed executor *dative quâ Father* of the said Arthur John Primrose, conform to decree dative of the Sheriff of the Lothians and Peebles, dated 22nd February 1889, and duly confirmed as such conform to Testament Dative in his favour by the said Sheriff, dated the 4th day of May 1889, as appeared from the Testament Dative sealed with the seal of the Commissariat of the County of Edinburgh, and signed by the Clerk of the Court at Edinburgh, a copy of which was annexed to the petition; that the said Bouverie Francis Primrose was residing beyond the jurisdiction of the High Court, and had, by his power of attorney (annexed to the petition), appointed one Harold Robertson King and the petitioner jointly and severally his attorneys and attorney, for him and in his name and on his behalf, to apply for and obtain a grant of letters of administration to the estate of the said deceased from the High Court, or any other competent Court in British India, and do and sign all things necessary for obtaining such letters of administration, and generally to do all such acts, deeds, matters and things as should be requisite and necessary in and about the premises; that the petitioner was therefore desirous of obtaining letters of administration to the property and credits of the said deceased; that such property and credits which were likely to come into his hands, consisted of shares and

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other moveable property, of the value of Rs. 27,326, or thereabout; and that no previous application had been made for a grant of probate or letters of administration to the estate of the said deceased, with effect throughout the whole of British India.

The manner in which the power of attorney, executed by Bouverie Francis Primrose in favour of the petitioner and Harold Robertson King, was executed, appears sufficiently stated in the judgment of the High Court.

The application was made by Mr. *Cowie* (Messrs. *Sanderson & Co.*), and the Court took time to consider whether the power of attorney could be accepted as sufficient to act on.

On the 13th July the following judgment was delivered by:—

NORRIS, J.—On Thursday, an application was made to me in Chambers by Mr. Cowie for letters of administration to this estate to be granted to the Hon'ble Bouverie Francis Primrose under these circumstances:

It appears that Mr. Arthur John Primrose, who was a member of the Bengal Civil Service, was drowned in crossing from Ostend to Dover, and on application to the Sheriff of the Lothians and Peebles, his father, Bouverie Francis Primrose, was appointed, what is called in Scotch law, Executor *Dative quâ Father*, and executed a power of attorney in Scotland in favour of the applicant here, authorizing him to take out letters of administration. The power of attorney was executed in the presence of Mr. Rutherford, a writer to the Signet, and J. McGillawie, a law clerk. Mr. Rutherford makes a declaration before the Lord Provost of Edinburgh, in which he declares that the power of attorney is signed by Mr. B. F. Primrose, and that the signatures of the witnesses are of their own proper hand-writing. The Lord Provost certifies, under the seal of the Corporation of the City of Edinburgh that Mr. Rutherford had made the declaration before him. Upon this, I have been asked to grant letters of administration. Trevelyan, J., granted an application for letters of administration in the goods of Emma Louisa Algeo, when one of the witnesses to the power of attorney made a declaration before the Lord Mayor of London. He has informed me that he was told it had been the practice to accept such declaration, and he did not feel at liberty to depart from the practice. Section 85

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IN THE GOODS OF A. J. PRIMROSE.

of the Evidence Act provides that the Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any Court, or Judge, Magistrate, British Consul or Vice-Consul, or Representative of Her Majesty or of the Government of India, was so executed and authenticated. This power of attorney is not executed before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney must be executed before or be authenticated by one of those persons. Therefore, I am reluctantly obliged to refuse this application. I have considered it necessary to say these few words in order that the profession might know what the practice is in future to be. The two cases, namely, *Anonymous* case (1) and *In the goods of Macgowan* (2) confirm the view I have taken.

Application refused.

Solicitors for applicant: Messrs. *Sanderson & Co.*

H. T. H.

CRIMINAL MOTION.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

IN THE MATTER OF THE PETITION OF ASLU AND OTHERS.

ASLU *v.* THE QUEEN-EMPRESS.*

1889 *July* 23.

Security for keeping the peace—Magistrate of the District—Appellate Court—Criminal Procedure Code (Act X of 1882), ss. 106, 423.

The Magistrate of a District when acting as an Appellate Court is not competent to make an order under s. 106 of the Criminal Procedure Code (Act X of 1882), requiring the appellant to furnish security for keeping the peace.

IN this case the petitioners and one Abdul Wahed Khan were charged before the Assistant Magistrate of Midnapore with rioting under s. 147 of the Penal Code. They were all convicted and sentenced to fines of various amounts, or, in default, to various terms of rigorous imprisonment.

* Criminal Motion No. 291 of 1889, against the order passed by C. Vowell, Esq., District Magistrate of Midnapore, dated the 25th of April 1889, affirming the order passed by Stevenson Moore, Esq., Assistant Magistrate of Midnapore, dated the 18th of March 1889.

(1) Fulton, 72. (2) Morton, 370.

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IN THE MATTER OF THE PETITION OF ASLU v. THE QUEEN-EMPRESS.

Against the convictions and sentences an appeal was preferred to the District Magistrate, who set aside the conviction of Abdul Wahed Khan, but dismissed the appeal of the petitioners. The District Magistrate further considered that, as there was a probability of further breaches of the peace, the petitioners should be bound over to keep the peace, and he accordingly directed that they should each give one surety in the sum of Rs. 100 to keep the peace for one year.

The petitioners then applied to the High Court to exercise its revisional powers and set aside the convictions, sentences, and order upon various grounds, and amongst them, that the order of the District Magistrate directing them to give a surety to keep the peace was illegal.

A rule was issued which now came on to be heard.

Mr. *Dass* and Baboo *Joygopal Ghose*, for the petitioners, in support of the rule.

No one appeared for the Crown,

The judgment of the High Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

This rule must be made absolute. The question raised in this case is whether an Appellate Court affirming a conviction and sentence has power, under s. 106 of the Criminal Procedure Code, to order the appellant to execute a bond for keeping the peace. In the Court below the learned Magistrate seems to have thought that he had power to pass such an order under that section, upon the authority of a Full Bench ruling in the case of *Empress* v. *Kanta Prosad* (1). But that was a case under the Criminal Procedure Code (Act X of 1872), s. 489, and that section provided that if "the Court or Magistrate by which, or by whom, a person is convicted, or the Court or Magistrate by which, or by whom, the final sentence or order in the case is passed, is of opinion that it is just and necessary to require such person to give a personal recognizance for keeping the peace, such Court or Magistrate may direct the taking of a bond to keep the peace." Now, the words "or the Court or Magistrate by which, or by whom, the final sentence or order in the case is passed"

(1) I. L. R., 4 All., 212.

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have been left out in s. 106 of the present Criminal Procedure Code; and it is further provided by the last-mentioned section that such Court may, at the time of passing the sentence, order the person convicted to execute a bond. Section 423 of the present Criminal Procedure Code expressly lays down what the powers of an Appellate Court are, and the power to take security for keeping the peace is not mentioned there: and there is no other provision of the law which enacts that the Appellate Court shall have the same powers as the Court of original jurisdiction has; and that being so, we do not think that, under the provisions of the Criminal Procedure Code (Act X of 1882), the Appellate Court has the power to order a security-bond to be taken; and we accordingly direct that the order of the District Magistrate, so far as it directs that each of the appellants, except Abdul, do give one surety of one hundred rupees to keep the peace for one year, be set aside.

H. T. H. *Rule made absolute.*

Before r. *ustice Trevelyan and Mr. Justice Beverley.*

NUR MAHOMED (PETITIONER) *v.* BISMULLA JAN (OPPOSITE-PARTY).*

1889 *July* 9.

Criminal Procedure Code (Act X of 1882), *s.* 488—*Evidence Act (Act I of* 1872), *s.* 120—*Bastardy proceedings—Order of affiliation—Evidence.*

Bastardy proceedings under the provisions of s. 488 of the Criminal Procedure Code are in the nature of civil proceedings within the meaning of s. 120 of the Evidence Act, and the person sought to be charged is a competent witness on his own behalf.

Upon a summons, charging that the defendant, having sufficient means, had refused to maintain his child by his *nika* wife whom he had subsequently divorced, the Magistrate found that the marriage had not been proved, but that, upon the other evidence adduced, including the similarity of the features and the name of the child with those of the defendant, who did not appear before him during the proceedings, but with whom he stated that he was well acquainted, the child was the illegitimate child of the defendant. He accordingly made an order for maintenance under the section.

Held, that, under the circumstances, he was wrong in taking into account the similarity of the names and the features of the child and the defendant,

* Criminal Motion No. 270 of 1889, against the order passed by Syed Abdul Jubber, Presidency Magistrate of Calcutta, Northern Division, dated the 3rd of June 1889.

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but as there was ample evidence of the paternity, he was justified in making the order he did, as it was immaterial for the purpose of determining the liability of the defendant to maintain the child, whether the mother had been married to the defendant or not.

THIS rule was obtained for the purpose of getting an order set aside which had been passed under s. 488 of the Criminal Procedure Code, directing the petitioner to pay the sum of Rs. 15 a month for the maintenance of a child, named Nur Ahmed, aged about 3½ years.

The charge, as laid in the summons, was as follows: "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years' old, the said child is by your *nika* wife, Bismulla Jan, whom you have subsequently divorced." The summons was issued at the instance of Bismulla Jan, the mother of the child, and both parties were represented by Counsel before the Magistrate, Nur Mahomed being exempted from appearing personally by an order made by the Magistrate, and not being present in Court on any of the various occasions on which the case was heard.

The judgment of the Magistrate was as follows:—

This is an application under s. 488 Criminal Procedure Code, for an order against the defendant Haji Nur Mahomed for the maintenance of a child aged about 3 years and 9 months, and named Nur Ahmed. The complainant's version of the case is that five years ago the defendant married her in the *nika* form; that the child was born in wedlock; and that seven or eight months after the birth of the child he discontinued his visits to her. The marriage is denied by the defendant, and the evidence adduced in support of it by the prosecution is wholly unworthy of credit. The only individuals who are said to have been present at the ceremony are the complainant's brother, her sister, and a man who gives lessons in the family. Although it is not necessary for the validity of a marriage under the Mahomedan law that there should be a good number of persons present, yet, according to custom, not only a man is nominated to perform the functions of a Kazi but friends on both sides are invited to witness a marriage. In this case not a single friend, not even Ahmed Sahib, who, according to complainant's own evidence, used to be with the defendant on other occasions, was present at his marriage with the complainant. There was none to act the part of a Kazi. The dower is said to have been Rs. 10 only. This sum is, no doubt, more than the minimum fixed by law, but it is not possible that the complainant, who was a dancing-girl, should have surrendered her liberty for a consideration which is less than what she expected as her wages for a night's performance. When a left-handed marriage takes place between a dancing-girl

and a respectable man of position, the proposal for an alliance generally emanates from the latter, and the former is not, therefore, satisfied with a moderate dower. The witness Haji Abdullah Dugmar has married a dancing-girl on payment of a dower of Rs. 2,500, and the complainant has herself got a dower of Rs. 1,000 at her subsequent marriage with a Hindu. It is not easy, therefore, to believe that, if the defendant had married her, she would have been satisfied with a trifling sum of Rs. 10, or would not have made him execute a deed of dower. It is also incredible that a man of the defendant's position in society would have allowed his wife to stay at the house of a professional songstress, such as her mother is, if he had led her to the altar; he would have naturally taken her to his own house, or, if that was not possible, would have removed her to some place where she would not be subject to the gaze of her mother's visitors. Under the above circumstances, I consider the story of her marriage with the defendant as a fiction. The story, I think, has been invented to create a right of inheritance for the boy.

The next question for determination is, whether the child is an illegitimate issue of the defendant? The mother of the child asserts that the defendant is its father, and there is sufficient proof that he was in the habit of visiting her about the time she became pregnant. No evidence is adduced by the defence to rebut her statement that she was in his keeping. It is contended that she had tried to father the child on one Jogendro Mullick, who was also, at one time, the complainant's paramour. I do not think the evidence which has been given on this point is deserving of any weight. There is no doubt that Jogendro kept the complainant for a certain period, but I am not satisfied that he kept her at the time of her conception. The evidence of Jogendro Nath's *mushahib* or companion, Aga Mahomed Ali, is anything but trustworthy. If Jogen was threatened with exposure and he had to pay a large sum of money to prevent her from carrying out her threat, there would certainly be taken some precautionary measure by Jogen or his friend, Aga Mahomed Ali, against the repetition of the threat. The death of Jogen, as Mr. Henderson argued, has led the defence to hint that he was the father of the child. There is no evidence that Jogen was the child's natural father. While, on the other hand, the evidence of the mother that the defendant is the father of the child, is corroborated by the ocular proof which the child itself furnishes. Although the witness for the defence, Aga Mahomed Ali, says that the child resembles the defendant in thinness only, no one who has seen Haji Nur Mahomed and sees the child can fail to observe a strong resemblance between the two. The child is, in fact, a miniature representation of the defendant. There is another matter which, in my opinion, confirms the statement of the complainant that the defendant is the father of the child. It is not disputed that the child was christened Nur Ahmed, and the name shows that within six days of its birth, when the ceremony of

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giving a name generally takes place, it was believed and known who the child's progenitor was. Not only the word "Nur" exists in both the names, but there is a correspondence of sounds in the terminal words Mahomed and Ahmed. Taking, therefore, all the circumstances of the case into a careful consideration, I am of opinion that the child is an illegitimate offspring of the defendant Haji Nur Mahomed. Mr. Garth contended that, as the complainant based the claim of the child to maintenance on the legitimacy of its birth, the Court can grant no allowance to it when its legitimacy was not established. I do not think this contention is right. Under the Statute quoted above, both legitimate and illegitimate children are entitled to maintenance, and although in this case the child is not proved to be legitimate, but is proved to be an illegitimate issue of the defendant, the law makes it obligatory upon the father to maintain it.

Suppose a child *X* sues its father *Z* for maintenance. Is it to have no maintenance because the Court, which tried the suit, declared that the marriage of *X's* mother with *Z* was void, owing to a certain legal defect in the marriage contract? The section quoted imposes on a husband or a father the duty of maintaining his wife or helpless children, both legitimate or illegitimate, and he cannot claim exemption from it except on the ground of poverty.

I direct that Haji Nur Mahomed pay Rs. 15 per month for the maintenance of his illegitimate child Nur Ahmed.

Against that order, the petitioner moved the High Court, and a rule was issued which now came on to be heard.

Mr. *Phillips* and Mr. *Roberts* for the petitioner.

Mr. *M. P. Gasper* and Mr. *Henderson* for the opposite party.

Mr. *Gasper* (showing cause).—The fact that Nur Mahomed was not called as a witness to deny the paternity of the child raises an almost irresistible presumption against him, and there can be no doubt that in such proceedings the person sought to be charged is a competent witness. Although there is no express decision to that effect in this country, the case of *In the matter of Tokee Bibee* v. *Abdool Khan* (1), decided by Wilson, J., shows that such proceedings are in their nature civil proceedings, and not criminal.

[TREVELYAN, J.—There can be no doubt that in England the defendant is a competent witness.—See Paley, 5th Edition p. 113.]

(1) I. L. R., 5 Calc., 536.

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Mr. *Gasper*.—I submit that here also he is a competent witness, and that Nur Mahomed might have given evidence himself to deny the paternity, and not having done so, the Court is entitled to presume that he could not do so. In England, the Act requires corroboration of the evidence of the mother, but the amount of corroboration required by the Courts is very slight—see *Cole* v. *Manning* (1) and *Lawrence* v. *Ingmire* (2); and the Courts will not interfere if there be any corroboration whatever of the mother's testimony. Here then is ample evidence against the defendant, and the Court ought not to interfere. The Magistrate would have been perfectly justified, had the defendant been present before him at the hearing, in comparing the similarity of his features with those of the child, and taking such similarity into account, and the mere fact that the defendant was exempted from personal attendance does not, I submit, preclude such comparison, when, as stated by the Magistrate, Nur Mahomed's features were well known to him.—See *Bamundoss Mookerjea* v. *Mussamut Tarinee* (3).

Mr. *Phillips* (in support of the rule) did not contend that the defendant was not a competent witness, and might have been called, but argued that the evidence did not justify the order, and that the Magistrate should not have acted on the similarity of the features and the name of the child with those of the defendant, and referred to *Bamundoss Mookerjea* v. *Mussamut Tarinee* (3) as not supporting the proposition contended for by the other side. He further contended that the case the defendant was called to meet, being the charge that the child was his child by a *nika* wife, the whole case stood or fell on the question as to whether or not the marriage was proved, and it was not open to the Magistrate to pass an order on the assumption that the child was the illegitmate offspring of the defendant.

Mr. *Roberts* followed on the same side.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

In this case the Officiating Magistrate of the Northern Division made an order against Nur Mahomed, the applicant before

(1) L. R., 2 Q. B. Div., 611. (2) 20 Law Times Rep., N. S., 391.
(3) 7 Moore's I. A., 169, see page 203.

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us, directing payment of Rs. 15 a month for the maintenance of a child, which the Magistrate found to be his child by one Bismulla Jan. We were asked, in the exercise of the revisional jurisdiction of this Court, to set aside that order. We gave a rule, and we were to a very great extent, if not entirely, induced to grant that rule by the circumstance that the Magistrate had compared the child, produced in Court, with what he recollected of the lineaments of Nur Mahomed, who had not appeared in Court, and thus acted upon the information, which he had obtained otherwise than in his Magisterial capacity, and also by the circumstance that he relied on the resemblance of name between the infant and the putative father. In granting the rule, we stated that the fact that Nur Mahomed had not been called as a witness was a circumstance weighing so strongly against the applicant that, although we sent for the record, we could not hold out to the applicant much hopes of success. Now we have heard Counsel on both sides; and the main contention placed before us by Mr. Phillips is that the suggestion of marriage having failed, the whole case failed. We however think that the basis of an application for the maintenance of a child under the provisions of s. 488 of the Code of Criminal Procedure is the paternity of the child irrespective of its legitimacy or illegitimacy. The fact of the marriage of the parents may be not only strong evidence to show paternity, but also raises a presumption which has a very strong bearing upon the question of paternity. The summons, which is in the record called a charge, runs thus: "That you, having sufficient means, refused to maintain your child Nur Ahmed, about 3½ years' old." This would have been quite sufficient for the present purposes, but the summons then states further "the said child is by your *nika* wife Bismulla Jan whom you have subsequently divorced." The statement, as to the child being by his *nika* wife, is not at all a necessary statement, and the failure to prove marriage, does not, in our opinion, destroy the case altogether. The case for the plaintiff was that originally, when a child, she was in the keeping of Nur Mahomed; this relationship between them ceased to exist a short time after, when she went to a man called Ashgar; and after that, to Jogendro Churn Mullick. Subsequently she left Jogendro Mullick and married

Nur Mahomed; and this child was the fruit of that marriage. The Magistrate, after hearing the evidence, came to the conclusion that the marriage was not proved; and we think that the Magistrate was right in coming to that conclusion. It appears however from the evidence that since the day on which the marriage is said to have taken place, this woman lived with Nur Mahomed and Nur Mahomed alone, until the child was born. She speaks to it, and there are witnesses who corroborate her statement. That would show, if uncontradicted, that this man was the father of the child. In fact they both lived together, and during this period the child was conceived. Evidence was given suggesting that Jogendro Mullick was the father of the child; but the evidence on this point has been disbelieved by the Magistrate, and we cannot say that the Magistrate was wrong. The evidence on the record shows, in the opinion of the Magistrate, that Nur Mahomed only could have been the father of the child, and there is evidence from which the Magistrate could arrive at such finding. Nur Mahomed was not called in the Police Court to contradict the case for the prosecution; and, except his Counsel in Court, no one on his behalf seems to have denied the paternity, and he never denied it. In England, it has been held more than once that, under the provisions of 14 and 15 Vic., c. 99, s. 2, bastardy proceedings are regarded as civil proceedings and the parties to them are capable of giving evidence; and, according to the case cited to us of Mr. Justice Wilson's, taken together with the English cases, there can be no question that bastardy proceedings are civil proceedings within the meaning of s. 120 of the Indian Evidence Act, and that the defendant thereto may give evidence on his own behalf. Mr. Phillips did not deny that this was the law; we are told that, after the witnesses for the defence had been examined, and Mr. Henderson had been heard in reply, Mr. Garth invited the attention of the Magistrate to the point whether Nur Mahomed was a competent witness or not. According to law, he was unquestionably a competent witness, and as he has not been called, we must make the usual presumption arising from the fact of such omission. The fact that Counsel by an error of judgment, or for some other reason, omitted to call him, does not, in the smallest degree, interfere with this presumption..

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We think, however, that the Magistrate was wrong in making use of his information, which he seems to have obtained otherwise than as a Magistrate. He was also wrong in using the circumstance of the similarity of names. That was not a circumstance which in the least could assist the Magistrate in coming to the conclusion of this kind. If it were so, any woman, by naming her child after a particular individual, might be able to make evidence in favour of herself, and thus give rise to a failure of justice. The Magistrate was therefore wrong in mixing up all these matters. But apart from these circumstances, there is ample evidence upon which the Magistrate could have made the order, and we have no reason to doubt the correctness of such order. The rule is discharged.

H. T. H. *Rule discharged.*

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

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June 26.

AUBHOY CHURN MOHUNT (PLAINTIFF, OPPOSITE-PARTY IN THE RULE) *v.* SHAMONT LOCHUN MOHUNT (DEFENDANT, PETITIONER IN THE RULE).*

Review of judgment—Code of Civil Procedure (Act XIV of 1882), *ss.* 623, 627, 629—*Letters Patent, s.* 15—*Practice.*

A second appeal was decided on the 1st June 1888 in favour of the respondent by Mr. Justice Wilson and Mr. Justice Beverley. On the 24th July 1888 an application for review was filed with the Registrar. Various reasons prevented the learned Judges above-named from sitting together until the month of March 1889. On the 6th March, the matter came up before their Lordships, when a rule was issued, calling upon the other side to show cause why a review of judgment should not be granted, being made returnable on the 28th March 1889.

On the 28th March, Mr. Justice Wilson had left India on furlough, and the rule was taken up, heard, and made absolute, by Mr. Justice Beverley, sitting alone: *Held*, that Mr. Justice Beverley had jurisdiction to hear the rule, and further that the order of that learned Judge was not a judgment within the meaning of s. 15 of the Letters Patent; and that no appeal

* Appeal under s. 15 of the Letters Patent against the order of Mr. Justice Beverley, one of the Judges of this Court, dated the 22nd of May 1889, in Rule No. 312 of 1889, in appeal from Appellate Decree No. 233 of 1888.

would lie therefrom, the order being final under s. 629 of the Code of Civil Procedure.

Bombay-Persia Steam Navigation Company v. *The Zuari* (1) and *Achaya* v. *Ratnavelu* (2) approved

ON the 1st June 1888, a certain second appeal was decided by Mr. Justice Wilson and Mr. Justice Beverley in favour of the defendant, respondent. On the 24th July 1888 the plaintiff being dissatisfied with that decision, presented an application for a review of judgment, which, in the ordinary course, was filed in the Office of the Deputy Registrar, but in consequence of the absence from Calcutta of one or other of the learned Judges who had decided the appeal, Mr. Justice Beverley having in August 1888 left Calcutta on leave returning in November in that year, and Mr. Justice Wilson being absent on deputation at the time of the return of Mr. Justice Beverley, and not returning to Calcutta till after the expiration of six months from the 24th July 1888, the rule to show cause why the review should not be heard was not issued until the 6th March 1889. The rule so granted was made returnable on the 28th March, but previously to that date, on the 6th March, Mr. Justice Wilson left India on furlough, and did not return to India until a period of more than six months had expired from that day. On the 28th March, the rule came up before Mr. Justice Beverley, sitting alone. At the hearing, an objection was taken that, under s. 627 of the Code his Lordship Mr. Justice Beverley had no jurisdiction to hear the rule; and that the proper course to be pursued was to direct the matter to stand over until the return from furlough of Mr. Justice Wilson; the contention raised upon that section was that inasmuch as both Mr. Justice Wilson and Mr. Justice Beverley were "attached to the Court" at the time the application was presented (whether the date be taken to be the 24th July 1888 or the 6th March 1889), and were not precluded by absence or other cause for a period of six months next after the application from considering the matter, those learned Judges were bound to hear the application as a Bench sitting together, and that no other Judge or Judges could hear it.

(1) I. L. R., 12 Bom., 171. (2) I. L. R., 9 Mad., 253.

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On this contention, Beverley, J., said :—" If the date of the application be taken to be, as I think it must be taken to be, the 24th July 1888, the facts are as follows : At the beginning of August I left Calcutta on leave, and when I resumed my seat in Court after the Vacation, Wilson, J., was absent at Poona. He did not return till after the 24th July 1888, and we were, therefore, precluded from sitting together to hear the application.

" If, on the other hand, the 6th March 1889 be taken as the date of the application, Mr. Justice Wilson took leave at the end of that month, and will not return to the Court till after the expiration of six months from that date . . . . . It seems to me that under the spirit of the section referred to, I, and I alone, am bound to hear this rule. The section is apparently intended to refer to a High Court which is specially excepted from the rule laid down in s. 624 . . . . . Section 627 imposes a very reasonable and proper restriction, and that restriction is this, that when the Judges, or any one of them who made the decree, can hear the application, within six months after its presentation, they or he, and they or he only, shall hear it.

" Now the present rule was granted by Mr. Justice Wilson and myself, but it does not follow that we must both hear it as a Bench sitting together; had Mr. Justice Wilson been absent for six months after the application, I should have had jurisdiction to grant the rule and hear it sitting alone. The case seems to me stronger when the rule was issued by both of us. I may draw attention to the analogous provisions contained in s. 626, proviso (*c*). I come to the conclusion that I have jurisdiction to hear the application sitting alone, and that to prevent further delay, I am bound to do so."

His Lordship then heard the rule and made the same absolute, directing the papers to be laid before the Chief Justice for the appointment of a Bench to hear the review.

Against that decision an appeal under s. 15 of the Letters Patent was made.

Mr. *Hill* (with him Baboo *Baikant Nath Dass*), for the appellant, contended that the matter ought to have been allowed

to stand over until the return of Mr. Justice Wilson; or that an application should have been made to the Chief Justice to appoint another Judge to sit with Mr. Justice Beverley to hear the review. He also contended that at all events the Court had jurisdiction under the Letters Patent to consider the case on its merits; the rule being made absolute by one learned Judge, it was a judgment within the meaning of s. 15 of the Letters Patent, and that, notwithstanding the provisions of s. 629 of the Code, an appeal would lie to this Court.

Mr. *Evans* (with him Baboo *Kishori Lall Sircar*), for the respondent, contended that Mr. Justice Beverley had jurisdiction to hear the rule, and that no appeal would lie from his order, citing *Achaya* v. *Ratnavelu* (1) and *Bombay-Persia Steam Navigation Company* v. *The Zuari* (2).

The judgment of the Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by

PETHERAM, C.J.—This is an appeal under s. 15 of the Letters Patent from an order of Mr. Justice Beverley, making a rule absolute to re-hear an appeal.

The case was originally a second appeal to this Court, which was heard by a Bench of this Court consisting of Mr. Justice Wilson and Mr. Justice Beverley. The second appeal was decided on the 1st June 1888, and it was decided in favour of the defendant; and the plaintiff, being dissatisfied with that decision, was desirous of having it reviewed, and, accordingly, on the 24th July 1888, an application for review bearing the proper stamp was filed with the Deputy Registrar of this Court. Section 623 of the Code of Civil Procedure provides that such an application shall come before the Judge or Judges who were parties to the original decree. Those Judges, as I said just now, were Mr. Justice Wilson and Mr. Justice Beverley. Various reasons prevented them from sitting together until the month of March 1889, and, on the 6th of that month, the matter was presented before those learned Judges, and upon its being so presented, they issued a rule calling upon the other side to show cause why the application should not be granted. The practice is, that such

(1) I. L. R., 9 Mad., 253. (2) I. L. R., 12 Bom., 171.

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applications should be presented in this way, and if the Judges, before whom the application is made, think there is anything in it, they grant a rule calling upon the other side to show cause against it; and the whole of these proceedings, the granting a rule and the argument of the rule when it is returned, are treated within the meaning of Chap. XLVII of the Code of Civil Procedure as being an entire application.

That being the state of things and the rule having been granted and made returnable on the 28th March, Mr. Justice Wilson took furlough and left before the 28th March, at any rate he was absent from Court on the 27th; so that when the rule was returned, one of the Judges had gone, and inasmuch as he was absent on furlough and another Judge appointed to officiate for him, we think he was not then attached to the Court within the meaning of s. 627 of the Code.

Then the question arises, what is to be done? The rule being returnable on the 28th, was heard by Mr. Justice Beverley alone. The present contention of the appellant is that that procedure was wrong, and either the matter ought to have stood over until Mr. Justice Wilson returned, or else that an application ought to have been made to me as Chief Justice to appoint another Judge to sit with Mr. Justice Beverley to form a Bench to hear it.

I do not think that it could be necessary for the matter to stand over, and I do not think that, if an application had been made to me, I should have had jurisdiction to hear it, and for this reason. The latter part of s. 627 of the Code provides that no other Judge or Judges of the Court, excepting the Judge or Judges who was or were parties to the original judgment, shall hear the application for review if the Judge or Judges or any one of them is still attached to the Court; so that it seems to me that although the Chief Justice of this Court has in general the duty cast upon him of appointing the Judges who are to constitute particular Benches for particular business, in these cases the constitution of the Bench is taken out of his hands, and is provided for by the Code; for the Code says that these applications shall be heard by the Judge or Judges remaining attached to the Court by whom the original decree was given.

As I said just now, at the time this rule was returned Mr.

Justice Wilson had gone away on furlough and another gentleman had been appointed to perform his duties, and, consequently, he had ceased to have any jurisdiction as a Judge of this Court for the time. He was not at the time attached to the Court, and, consequently, Mr. Justice Beverley was the only one of the Judges who heard the appeal who remained attached to the Court, and was, in my opinion, the only Judge who could be appointed to hear this application. So that in our opinion Mr. Justice Beverley was quite right in deciding that he had jurisdiction to hear the matter, and was in fact the only person who could hear it. That ground therefore fails.

The other point made by the appellant here is that we have jurisdiction under the Letters Patent to consider the question on the merits, whether Mr. Justice Wilson and Mr. Justice Beverley were right in granting a rule, and whether Mr. Justice Beverley was right in making it absolute; and this argument proceeds upon the ground that inasmuch as the rule was made absolute by one Judge, that is a judgment within the meaning of s. 15 of the Letters Patent, and that, notwithstanding the provisions of s. 629 of the Code of Civil Procedure, an appeal lies to this Court.

The first question is, whether that is a decision within the meaning of that section of the Letters Patent? In my opinion it is not, because the Courts have laid down over and over again, I think up to the Privy Council, that "judgment" there means a judgment that decides the rights of the parties. This order of Mr. Justice Beverley, making this rule absolute, did not decide the rights of the parties in any sense. All it decided was that in his opinion the trial of the appeal had been unsatisfactory, and it would be in the interests of justice that it should be re-heard. It decides nothing more. The rights of the parties are still at large as before. In addition to that, we think that the matter is limited by the terms of s. 629. That section provides that the order rejecting the application shall be final. It then goes on to say, that an order admitting the application may be appealed against on several grounds, and it seems to us that the meaning of that is, that it may be appealed against on those grounds and no other; and that being the case, it, in our

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opinion, takes away an appeal in the matter, because the Code does contemplate this matter being heard under certain possibilities by one Judge and then takes away an appeal from his decision.

Under these circumstances it seems to me that on neither of these grounds can an appeal be entertained on the merits. The two cases in the Madras and Bombay High Courts, *viz.*, *Achaya* v. *Ratnavelu* (1) and *Bombay-Persia Steam Navigation Company* v. *The Zuari* (2), take the same view of the matter, and as to those decisions it is sufficient for us to say that we entirely agree with them. In the result this appeal will be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Sir W Comer Petheram, Knight, Chief Justice, and Mr. Justice Gordon.

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July 18.

BASHARUTULLA (ONE OF THE DEFENDANTS) *v.* UMA CHURN DUTT (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Sale in execution of decree—Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287—Sale set aside as being no sale—Execution—Possession, Recovery of.

A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation: *Held*, that there had been no sale within the meaning of the Code; proclamation of the time and place of sale and the holding of the sale at such time and place, being conditions precedent to the sale being a sale under the Code.

THIS was a suit for possession of a certain jumma under the following circumstances:—

The defendants, Nos. 2, 3, 4 and 5, who were the landlords of the plaintiff, had obtained a rent-decree against the plaintiff, and in execution of this decree, the jumma belonging to the plaintiff was advertised for sale, the sale being fixed for the 20th June 1885.

* Appeal from Appellate Decree No. 1671 of 1888, against the decree of Baboo Krishna Mohun Mookerjee, Subordinate Judge of Khulna, dated the 28th of July 1888, reversing the decree of Baboo Saroda Pershad Chatterjee, Munsiff of Baglahat, dated the 30th June 1888.

(1) I. L. R., 9 Mad., 253. (2) I. L. R., 12 Bom., 171.

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Before the day on which the sale was fixed arrived, the plaintiff arranged with his landlord to stay the sale on payment of a portion of the decretal money, and on a *kistibundi* being entered into this arrangement was communicated by the landlord to his Naib with directions to him to stay the sale. On the 20th June the plaintiff and the defendant's Naib proceeded to the Court House to stay the sale, reaching the Court before twelve o'clock. On so arriving, they discovered that the sale had been held by the Munsiff at 10-30 instead of at twelve o'clock, as advertised, and that there being no other purchasers at that early hour, the jumma in question was purchased by the defendant No. 1, a pleader of the Court. The plaintiff (after failing to come to terms with the purchaser) then applied under s. 311 of the Civil Procedure Code to have the sale set aside. This application was rejected, and the sale was in due course confirmed. The plaintiff thereupon brought this present suit to recover possession of the jumma.

The defendant No. 1 alone appeared, and contended that as the sale had not been held fraudulently, it could not be set aside.

The Munsiff found that it had not been established that the sale at an early hour was the effect of a preconcerted plan on the part of the decree-holder with the intention of defrauding the plaintiff; that, if such facts had been shown, they would have formed good reasons for setting aside a sale under an application made under s. 311 of the Code, but that the plaintiff had failed to substantiate such facts in his application under that section, which had been dismissed by an order which had been unappealed against; that under s. 244 of the Civil Procedure Code, the plaintiff could not raise the question again in a civil suit; but that at least, if such a suit as the present would lie, there must be clear evidence (which there was not) to show that the defendant No. 1 was a party to the fraud (if any) alleged. He therefore dismissed the suit.

The plaintiff appealed to the Subordinate Judge, who held that the sale held before the hour fixed was absolutely void, and reversed the decision of the Munsiff.

The defendant appealed to the High Court.

Moulvi *Mahomed Yusuf,* for the appellant, contended, that what had taken place was a mere irregularity, and the sale could

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only be set aside on that ground under s. 311 of the Code; a suit being expressly excluded by that section and cited *Sharoda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (1), which followed the case of *Virararghava* v. *Venkata* (2), on the question as to whether the suit would lie.

Baboo *Srinath Banerjee*, for the respondent, contended, that the sale proclaimed under s. 287 of the Code had not been carried out; and that there had been no sale within the meaning of the Code and therefore no property could pass to the purchaser.

The judgment of the Court (PETHERAM, C. J., and GORDON, J.) was delivered by

PETHERAM, C.J.—This is a suit which has been brought by the plaintiff against the defendants, claiming various reliefs, and, among other things, the plaintiff claims to set aside the sale of certain property as being fraudulent, and, in addition to that, he claims to recover possession of that property from the defendants, and he claims any other relief to which he may be found entitled. The Judge has decreed the suit, and the appeal has been preferred to this Court, really on the ground that such a suit will not lie at all by reason of the provisions of the Code of Civil Procedure.

The facts of the case are that the present plaintiff had a decree passed against him for a sum of money due to certain persons, some of whom were his landlords, or at all events his judgment-creditors. He did not pay that money, and his property was attached and was proclaimed for sale by reason of the plaintiff's failure to pay the sum decreed, and according to the proclamation, the sales, amongst which the sale of this particular property was one, were advertised to take place on a certain day. Before that day arrived, the present plaintiff arranged with his creditors to pay them off the amount of their decree by instalments, and that the property should be released from attachment and not sold, and upon the faith of that arrangement, both the present plaintiffs and his three creditors attended at the place of sale at 12 o'clock on the day stated in the proclamation, and

(1) I. L. R., 11 Calc., 376. (2) I. L. R., 5 Mad., 217.

found, when they got there, that the sales were all over; and that the sales, instead of commencing at 12 o'clock, had commenced at about 10 o'clock, and concluded before 12 o'clock, the advertised time. Under these circumstances, an application was made by the plaintiff to get that proceeding set aside for irregularity, and that proceeding was disposed of by an arrangement made between the plaintiff and the present defendants that a certain sum of money should be paid by the present plaintiff, being the amount which the purchasers had paid; and that the purchasers should withdraw all claim to the property. The proceeding to set aside the sale accordingly went off upon that arrangement being come to, but afterwards, as the Judge finds, the purchasers, the present defendants, refused to carry out their part of the agreement in this sense, that they said, we decline to give up all claim to this property upon the payment of the purchase-money into Court. Upon this, the arrangement fell through, and the purchasers got possession of the property under their sale certificate, and upon that the plaintiff brings this suit for the purpose of getting back his property, and of having it declared that this sale did not affect his right to possession at all.

If what took place was a mere irregularity, then the only proceeding for setting the thing aside was a proceeding under s. 311 of the Code of Civil Procedure, the latter portion of that section providing that no suit shall be brought to set aside a sale for mere irregularities; but if the sale took place under such circumstances that it was not a sale under the Code at all, then it is contended that no property passed under it, and that the judgment-debtor has a right to bring this suit to get back his property, and to have it declared that the purchasers have no right to it at all.

The question then is, whether what took place here was an irregularity only, or whether there was no sale within the meaning of the law at all.

By s. 287 of the Code, it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall

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state the time and place of sale, and shall specify fairly and accurately certain other things.

There is then a provision in the Code that, before a sale takes place, the time and place of sale shall be advertised. It is perfectly true that there is no provision in the Code that the sale shall take place at the time and place advertised, but it is clear that such a provision must be implied, and that consequently no sale can take place under the Code except at the time and place advertised under the Code.

As a matter of fact, the sale in this case did not take place at the time advertised. When the time advertised arrived, the property had been sold, and the whole thing was over; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late.

Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property.

A case has been cited, which was decided by Mr. Justice Pigot and Mr. Justice Beverley, of *Sharoda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (1). That case proceeded upon s. 244 of the Code of Civil Procedure, and not upon the sections now under our consideration. It seems to us that that case has no bearing upon the present one, and that the Judge was right in the conclusion at which he arrived, and this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

(1) I. L. R., 11 Calc., 376.

APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr Justice Beverley.

SCHEIN (APPELLANT) *v.* THE QUEEN-EMPRESS (RESPONDENT).* 1889 *July* 18.

Appeal in Criminal Case—Criminal Procedure Code (Act X of 1882), s. 411—Bengal Excise Act (Bengal Act VII of 1878), ss. 60, 74—Appeal from sentence of Presidency Magistrate—"Like offence—" Punishment on second or subsequent conviction of offence under Bengal Excise Act.

No appeal lies from a sentence of six months' rigorous imprisonment and a fine of Rs. 200, or a further period of three months' simple imprisonment, passed by a Presidency Magistrate.

The offence of selling wine retail by a person who has only a wholesale license is an offence of a like nature to that of selling wine without a license at all, within the meaning of the term "like offence" as used in s. 74 of the Bengal Excise Act.

Ram Chunder Shaw v. *The Empress* (1) followed.

THIS was an appeal against a conviction by the Chief Presidency Magistrate of an offence under the Bengal Excise Act (Bengal Act VII of 1878.) The accused, who was a licensed wholesale vendor of spirituous and fermented liquor, was charged under s. 60 of the Act, with having, on the 7th day of June 1889, sold on two different occasions imported liquor by retail, and also, on the 8th of May and subsequent dates, sold imported liquor by retail without an excise retail license. It appeared in evidence that an Excise Officer, named Siddons, sent one Ashruff with a marked rupee and two marked four-anna bits to the accused with instructions to purchase three pints of claret. Ashruff went and returned almost at once with the wine, on which the Excise Officer and others rushed into the house and forcibly took from the accused the marked money which they found on his person. In the accused's room was found a book containing entries of sales of wine, all or most of which the prosecution contended were of a retail nature. It was found that the accused had been convicted on the 8th May 1886 of an

* Criminal Appeal No. 463 of 1889, against the order passed by F. J Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 11th of June 1889.

(1) I. L. R., 6 Calc., 575.

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offence under the Act, the offence being selling two dozens of claret without a license.

The Magistrate, believing the evidence for the prosecution convicted the accused of the offence charged, and, under the provisions of s. 74 of the Act, sentenced him to pay a fine of Rs. 200 or in default to undergo three months' simple imprisonment, and also to undergo six months' rigorous imprisonment. Against that conviction and sentence the accused appealed to the High Court, upon the grounds that the evidence did not justify the conviction, and that as there was no evidence that he had been convicted of a like offence to the one charged, the sentence of six months' rigorous imprisonment was bad in law.

Baboo *Umbica Churn Bose* for the appellant.

Mr. *Acworth* for the Crown.

On the appeal being called on, Mr. *Acworth* objected that no appeal lay. He relied on the language of s. 411 of the Criminal Procedure Code, and referred to the case of *In the matter of Jotharam Davay* (1), which he pointed out had been decided under the similar provisions contained in s. 167 of the Presidency Magistrates Act (Act IV of 1877) which was then in force.

The Court here stopped Mr. *Acworth* and called on Baboo *Umbica Churn Bose*, who contended that s. 411 did not apply, but upon being referred by the Court to ss. 413 and 415 of the Code, contended that whether an appeal lay or not it was a case in which the Court should exercise its revisional powers under s. 439. He then went into the facts of the case and contended that the conviction was not justified, and that even if it was, the sentence of rigorous imprisonment was illegal as the conviction for selling without a license was not a like offence to selling retail with only a wholesale license, although he admitted that the decision in *Ram Chunder Shaw* v. *The Empress* (2) was against him.

Mr. *Acworth* was not called on.

The judgment of the High Court (TREVELYAN and BEVERLEY, JJ.) was as follows:—

The first question which was raised before us was one raised by the learned Counsel for the prosecution. He contended that

(1) I. L. R., 2 Mad., 30. (2) I. L. R., 6 Calc., 575.

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no appeal lies in this case. This is an appeal from the decision of the Presidency Magistrate inflicting a sentence of six months' rigorous imprisonment and a fine of Rs. 200, and, in default of payment of the fine, three months' simple imprisonment.

The question depends on the construction of s. 411 of the Criminal Procedure Code, which says: "Any person convicted on a trial held by a Presidency Magistrate, may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees."

In this case the Magistrate has neither sentenced the appellant to imprisonment exceeding six months nor has he sentenced him to a fine exceeding two hundred rupees. But it is contended by the pleader for the appellant that the combination of the sentences of imprisonment and fine, gives an appeal. That is not justified by the words of s. 411, and we think a reference to s. 415 makes the construction of the earlier section clear. Section 415 says: "An appeal may be brought against any sentence referred to in s. 413 or s. 414, by which any two or more of the punishments therein mentioned are combined" . . . . There is no mention of s. 411 in that section; and, according to the ordinary construction, it follows that the Legislature did not intend to apply to s. 411 the provision in s. 415, that is to say, that a combination of punishments does not give a right of appeal under s. 411, though it does so under ss. 413 and 414. Section 404 provides as follows: "No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force."

Section 411 is the only section under which an appeal lies, and therefore it seems to us that no appeal lies in this case. In this view we are supported by the decision in *In the matter of Jotharam Davay* (1), in which s. 167 of the Presidency Magistrates Act (IV of 1877) was considered. The terms of that section are exactly similar to those of s. 411 of the Code of Criminal Procedure now in force. It is not necessary for us to go over the facts of that case. It is sufficient to say that there is no distinction whatever to be drawn between

(1) I. L. R., 2 Mad., 30.

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the circumstances of that case and the circumstances of this case. The terms of the Act they were then applying are the same as the terms of the Act we are now applying, and the reasons given by the Judges in that case seem to us conclusive on this question.

It appears that a Division Bench in another case, *viz.*, *Ram Chunder Shaw* v. *The Empress* (1), entertained an appeal in a case of this kind from the order of the Presidency Magistrate, but it is to be remarked that in that case, the question as to whether there was an appeal or not was not raised by Counsel and was not apparently considered by the Court, and so it is no assistance to us as an authority. We consider that no appeal lies in this case, but as a Court of Revision we have the right to look into the facts, and we accordingly heard the learned pleader for the appellant with regard to the facts of the case in order that we might see whether there are circumstances which would justify us in interfering under our powers of revision. Having heard the whole evidence, we think there is nothing in this case which would justify our interference.

There has been no irregularity in procedure, and we think that the Magistrate has arrived at a right conclusion on the facts of the case.

Much has been made of the fact that the witnesses for the prosecution were persons interested in getting a conviction. In cases of this kind it is impossible to put forward witnesses who are not in some degree interested. That circumstance would render it necessary for the Magistrate to examine the evidence for the prosecution carefully, but it is not a circumstance which would prevent a conviction.

It appears from the evidence in the case that there was found in the room of the accused a book containing memoranda of sales of liquors. This book was given in evidence, and in the affidavit used before us on behalf of the accused and made by a person who was in Court during the time, the deponent speaks of Mr. Siddons having said in his evidence that he found this book in the room of the accused. The book which was produc-

(1) I. L. R., 6 Calc., 575.

ed contains a number of entries purporting to be entries ofthe sale of liquor by retail. It was suggested by the learned pleader for the appellant that possibly that was a book recording a series of purchases. We think that the only possible inference is that it is an account of sales by retail. People do not purchase by retail in order to sell wholesale. The circumstance that an account of this kind containing a number of sales of liquor by retail is found in the room of a person who has only got a license to sell wholesale, to some extent supports the evidence for the prosecution. It shows that he was in the habit of doing an act which the prosecution in this case are charging him with doing. Moreover on the question of punishment, it is evidence which the Magistrate is not only entitled to look at, but to consider to the fullest extent. On the facts, therefore, we see no reason to interfere.

There is one more question to consider. It has been argued that the Magistrate has no power to give imprisonment in this case. The Excise Act (Bengal Act VII of 1878), s. 74, under which this prosecution was instituted, provides: "Whenever any person is convicted of an offence against the provisions of this Act, punishable with a fine of two hundred rupees or upwards, after having been previously convicted of a like offence, he shall be liable, in addition to the penalty attached to such offence, to imprisonment for a period not exceeding six months." It is in evidence that the appellant was, on the 18th May 1886, convicted of the offence of selling two dozens of claret without a license under the provisions of this same Act.

The question before us is, whether the selling of wine without a license, is an offence like to that of selling wine by retail, when the vendor has got a wholesale license only. That question is concluded by the decision to which we have referred in the case of *Ram Chunder Shaw* v. *The Empress* (1). Morris and Prinsep, JJ., there said this: "It appears to us, however that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of Rs. 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term, 'like offence.'"

(1) I. L. R., 6 Calc., 576.

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That decision is an authority for saying that the Magistrate was right in the view that he took of the law. We agree with the decision, and we think that the offence of selling wine by retail, with a wholesale license, is an offence like to the offence of selling wine without a license at all; it is equally the offence of selling wine without having a license so to sell it.

It remains only to consider the question of punishment. We do not think that under the circumstances there is anything excessive in the punishment.

In the result we dismiss the appeal and decline to interfere.

H. T. H. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Pigot.

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August 15.

BANK OF BENGAL (PLAINTIFF) *v.* KARTICK CHUNDER ROY AND OTHERS (DEFENDANTS).*

Decree—Form of decree—Suit on Bill of Exchange—Civil Procedure Code (Act XIV of 1882), ss. 532, 538—Negotiable Instruments (Act XXVI of 1881), s. 35.

A plaintiff suing on a bill of exchange the drawer, acceptor, and endorser, where the endorsement has been made before maturity and without restriction, is entitled to a decree against all three defendants; a decree containing a condition exempting the endorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is therefore illegal.

THIS was a suit under Chapter XXXIX of the Code of Civil Procedure, brought by the Bank of Bengal against Kartick Chunder Roy, the acceptor, Gocool Chunder Mullick, the drawer, and Paul J. Valetta, the endorser, of a bill of exchange for Rs. 5,000, payable ninety days after sight. The defendants obtained no leave to defend.

The facts were that, on the 30th June 1888, Gocool Chunder Roy drew a bill of exchange for Rs. 5,000, ninety days after sight, on Kartick Chunder Roy. This bill was, on the 2nd July 1888, accepted by Kartick Chunder Roy, and was endorsed over before

* Original Civil Appeal No. 9 of 1889, against the decree of Mr. Justice Norris, dated the 18th of February 1889.

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maturity and without restriction by Paul J. Valetta to the Bank of Bengal. On the 4th October 1888, the bill was presented to Kartick Chunder Roy, but was dishonoured. The Bank thereupon gave notice of dishonor to the other two defendants, and, on the 10th October 1888, the defendant Gocool Chunder Roy paid to the Bank Rs. 1,000. No further payments being made, the Bank brought this suit against the three defendants above-named for Rs. 4,000, with interest together with costs of noting and presentment.

Mr. *Handley*, for the plaintiff Bank, the defendants not having obtained leave to appear and defend, asked for a decree for the amount due as against all the defendants, citing s. 35 of the Negotiable Instruments Act of 1881.

Norris, J., gave a decree for the sum of Rs. 4,000 with interest at 6 per cent. from the date of dishonour to the date of decree, and Rs. 19 for notorial charges, costs on Scale 1 ; but he directed that execution should not issue against the endorser until the plaintiff Bank had exhausted their remedy against the drawer and acceptor.

The plaintiff Bank appealed against so much of the decree of Mr. Justice Norris as restricted their remedy against the endorser.

Mr. *Phillips* for the appellant.

The judgment of the Court (PETHERAM, C. J. and PIGOT, J.) was delivered by

PETHERAM, C.J.—This is a suit by the plaintiffs, the holders of a bill of exchange, against three persons (the drawer, the acceptor, and endorser) under the Negotiable Instruments Act (Act XXVI of 1881. Section 35 of that Act provides that, in the absence of a contract to the contrary, whoever endorses and delivers a negotiable instrument before maturity without in such endorsement expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, and the Code of Civil Procedure provides that the holder of a bill of exchange may sue all the parties to it in one action. This has been done, and there is no question that the parties are all equally liable to the plaintiffs. The learned Judge has given judgment against all

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three, but he has made it a condition of the judgment that no execution is to issue against the endorser until the holder has exhausted his remedies against the drawer and acceptor. We are unable to agree with the learned Judge that he had power to place such a condition upon the holder in this case. The law entitles the holder of a bill of exchange to sue all the parties in one action or in separate actions; and, having brought his suit, the judgments are practically separate, and may be enforced against each or all of the parties. We think then that the Judge was wrong in imposing this condition, and this appeal to amend the decree by striking out that condition must be decreed, but without costs. *Appeal allowed.*

Attorneys for the Appellants: Messrs. *Morgan & Co.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1889
June 25.

JONARDON MUNDUL DAKNA AND ANOTHER (PLAINTIFFS) *v.* SAMBHU NATH MUNDUL AND OTHERS (DEFENDANTS). *

Arbitration—Award on one point only—Remission to arbitrator—Refusal by Arbitrator to act—Limitation—Adverse possession.

Several points arising in a suit were referred for decision to an arbitrator. The arbitrator made his return, deciding by the award one only of the points referred to him, *viz.*, that the defendants had been in possession of the land in suit for more than twelve years. The plaintiffs and the defendants claimed under the same landlord.

The Munsiff remitted the award to the arbitrator for determination of the other matters originally referred to him; the arbitrator, however, refused to act further in the matter, and the Munsiff himself took up the case and decided it in favour of the plaintiff. On appeal, the Subordinate Judge held that the award made by the arbitrator was sufficient for the determination of the case, and reversed the decision of the Munsiff, and gave the defendants a decree in terms of the award.

Held, that as the plaintiffs and the defendants claimed under one and the same landlord, and the question between them being which of the two had the better title to the land in dispute, the case could not have been concluded by the finding of the arbitrator upon the question of possession, and that

* Appeal from Appellate Decree No. 1761 of 1888, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Jessore, dated the 7th of August 1888, reversing the decree of Baboo Gopal Kristo Ghose, Munsiff of Narrail, dated the 13th of February 1888.

the Munsiff had acted rightly, on the arbitrator declining to award, in deciding the case himself.

THIS was a suit to recover possession of certain lands by the plaintiffs under a lease granted in the year 128[illegible]. The plaintiffs alleged that they had been dispossessed therefrom by the defendants on the 23rd Bysack 1292. The defendants claimed the land as being within their *jamma*, alleging that they held it under the same landlord through whom the plaintiffs claimed, and denied that the plaintiffs had ever been in possession thereof, and pleaded limitation. The issues framed were:—

(1) Is the suit barred by limitation?

(2) Has the plaintiffs a *jammai* right to the disputed lands, and were they in possession and dispossessed thereof?

(3) Have the defendants a *jammai* right to the said lands?

(4) What are the correct south and west boundaries of the land.

The case was then referred to arbitration.

The arbitrator submitted his award, finding that the defendants had been in possession for more than twelve years, and made no return of any finding on the other issues. The matter then came up before the Munsiff for final disposal, and he referred the matter back to the arbitrator for determination of the other questions. The arbitrator, however, refused to move further in the matter; and the Munsiff therefore tried the case himself, and decided the case in favour of the plaintiffs.

The defendants appealed to the Subordinate Judge who held that the award was perfectly legal, and that it could not be set aside by the Munsiff on the ground that the arbitrator had not decided all the points referred to him; the point decided by him being sufficient for the dismissal of the plaintiffs' claim; and he therefore directed that the plaintiffs' suit should be dismissed in terms of the award filed by the arbitrator.

The plaintiffs appealed to the High Court.

Baboo *Chunder Kant Sen*, for the appellants, contended that it was open to the Munsiff to remit the award under s. 520 of the Code of Civil Procedure; and that, on the arbitrator refusing to re-consider the matter, the only course open to the Munsiff was to try the case himself; he further submitted that

Judge should, at all events, have tried the ...its.

Latoo Behari Bose for the respondents.

The judgment of the Court (GHOSE and GORDON, JJ.) was delivered by

GHOSE, J.—This appeal arises out of a suit brought by the plaintiffs to recover possession of certain lands which they alleged had been demised to them by a certain landlord in the year 1289. The defence was, that the defendants had held the land in question from a period prior to the execution of the lease in 1289 as a part of his *jammai*, and therefore the plaintiffs had no right to recover. They also pleaded that they were in possession of the land for more than twelve years, and therefore the plaintiffs' claim was barred by limitation.

Upon this state of the pleadings, certain issues were raised between the parties in the Court of first instance: one was as to limitation, and another as to the titles of the plaintiffs and the defendants respectively. Upon the application of both parties, the case was referred to arbitration; but the arbitrator to whom the case was referred confined his award only to the question of limitation, he being of opinion that the defendants had held possession of the land in suit for more than twelve years, and that the plaintiffs' allegation, that they had been in possession of it for some time and had been subsequently dispossessed, was not made out

The matter then came before the Munsiff for final disposal. That officer was of opinion, and we think rightly of opinion, that the award given by the arbitrator had left undetermined some of the matters which had been referred to him for decision, and we may here observe that the second and third issues laid down by the Munsiff were issues which were essentially necessary for the determination of the case. Being of that opinion, the Munsiff remitted the case to the arbitrator with the view that the other issues in the case might be determined.

The arbitrator, however, declined to act further in the matter, and sent the case back to the Munsiff. In this state of things, the Munsiff had no alternative but to try the case out himself,

and being of opinion that the plaintiffs' case [illegible] and that the defendants had no *jamma'i* right in question, he gave a decree to the plaintiffs.

The Subordinate Judge, on appeal, expressed himself as follows: "The arbitrator found as a fact, that the defendant had been in possession for more than twelve years, and submitted his award against the plaintiffs. The award was perfectly legal, and was supported by the fact found, and it could not be set aside merely on the ground that the arbitrator had not decided all the points referred to him. The point decided by him was sufficient for the dismissal of the claim, and there was no necessity for any decision on the other points. The lower Court ought to have disposed of the case according to the award which was perfectly legal." He therefore set aside the order of the lower Court, and directed that the case should be disposed of in terms of the award filed by the arbitrator.

It seems to us that the view which the Subordinate Judge took is not the correct one; and that, in the circumstances of this case, the Munsiff was right in remitting the case to the arbitrator for determining the points which he had left undetermined. It will be observed that the lease under which the plaintiffs claimed the property was one granted in 1289, *i.e.*, within twelve years of the institution of the suit. The defendants no doubt plead the law of limitation, but they admit that the person who granted this lease to the plaintiffs is the person under whom they have been holding the land as tenants. It follows therefore that, if the defendants had been holding the land adversely to anybody for more than twelve years, it must have been their own landlord. But there could be no adverse possession against the landlord, and the defendants could not acquire a title against him. And if the landlord had brought a suit to eject them, they could not have successfully set up the plea of limitation. It has been found that the landlord gave the lease to the plaintiffs in 1289, and they bring this suit, upon the basis of that lease, to recover possession, and upon the ground that the defendants have no title to the land; and the whole question between the parties seems to be, whether the title of the plaintiffs or of the defendants is to prevail.

ore of opinion that the case could not be con-
e finding that was come to by the arbitrator upon
on of possession, and that the Munsiff was right, when
rbitrator declined to complete the award, in deciding the
se himself.

Accordingly, we direct that the case be sent back to the Subordinate Judge, with the view that he should re-try the appeal on its merits. The costs will abide the result.

Case remanded.

T. A. P.

END OF VOL. XVI.